No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

77-142

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 548 F.2d 1355.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 23, 1977. A timely petition for rehearing with suggestion for rehearing

en banc was denied on May 27, 1977 (App. C, *infra*). On June 20, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether conduct within the plain language of the Hobbs Act (18 U.S.C. 1951) is nonetheless not proscribed by that Act unless it is also proven to constitute "racketeering."

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted under an indictment (App. D, *infra*) charging attempted bank robbery, in violation of 18 U.S.C. 2113(a), and attempted obstruction of commerce by extortion and threats of violence, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to four years' imprisonment. The court of appeals reversed, one judge concurring in part and dissenting in part (App. A, *infra*).

1. The evidence at trial showed that in March of 1975, respondent and an accomplice, Ted Houser, devised a plan to extort $100,000 from the Bank of Marin in San Rafael, California, by means of threats to the bank president (Tr. 48-51). When the FBI learned of the plan through an informant (Tr. 51-52), agents warned the bank's president, William Murray, and furnished him with a package of false currency and a device to record any telephone threats (Tr. 20-23, 30-34).

Shortly before noon on April 11, 1975, respondent and Houser were observed, first in a car parked in the vicinity of the bank (Tr. 149-150, 192-193), then following Murray's car when he drove to a lunch appointment (Tr. 153-154). While Murray was at the luncheon meeting, agents saw respondent and Houser leave their car and stand at the front of Murray's car (Tr. 156-157, 198-199). When Murray returned to the bank, they followed (Tr. 91-92, 129-130). At about 4:00 p.m. Houser telephoned Murray (who recorded the conversation) and told him that remote-controlled bombs had been placed both at the bank and at Murray's home. Houser instructed Murray to remove $100,000 from the bank vault, take it to his car, and then follow the instructions he would find attached to the front bumper. Houser threatened that if his instructions were not followed the bombs would be detonated, "killing your wife and many others. If you manage to foil this plan, the People's Liberation Army will declare war on your family, your wife and your children will be assassinated one by one" (Gov't Ex. 1; Tr. 34-35).

Murray put the false currency in a briefcase and went to his car, where he found a note that instructed him to drive to a parking lot in San Anselmo, drop the money behind a Goodwill box, and return to the bank (Tr. 35-36; Gov't Exs. 2 and 3). Respondent's fingerprint was on this note (Tr. 238-245).

Murray followed the instructions and left the briefcase in the parking lot (Tr. 38-39, 220-223, 205-207). Moments before Murray arrived at the parking lot,

government agents saw the automobile that respondent and Houser had used earlier drive slowly by; one of its occupants was wearing clothes like those respondent had been seen wearing earlier (Tr. 222-223). A few minutes after Murray left the briefcase, it was found by two young boys, who opened it and tore open the packages of false currency (Tr. 206-208).

2. On appeal, the government confessed error on the bank robbery count,[1] and a divided panel reversed respondent's conviction on the charge of attempted extortion. The majority opinion did not question the fact that the evidence showed attempted extortion of bank assets, and thus fell within the language of Section 1951, but it nevertheless concluded, relying on the analysis of legislative intent in *United States* v. *Yokley*, 542 F. 2d 300 (C.A. 6), that an act "must constitute 'racketeering' to be within the perimeters of the [Hobbs] Act" (App. A, *infra*, p. 3a). The court asserted that a contrary interpretation would usurp virtually the entire criminal jurisdiction of the States.

Judge Carter dissented from the reversal of respondent's conviction for violation of the Hobbs Act on the ground that the "plain and unambiguous language" of the statute prohibits any attempted extortion that has the requisite effect on commerce, and

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[1] The government agreed that 18 U.S.C. 2113(a) does not apply unless the taking of the bank's money is "from the person or presence of another," and that respondent's plan did not contemplate any trespass into the bank or a taking of the money from the person or presence of the bank manager. But see n. 5, *infra*.

neither the language nor the legislative history of the Act limits its coverage to "racketeering." He found it particularly inappropriate to refuse to apply the Hobbs Act in this case, which involved an attempted extortion from a federally insured bank, implicating an industry essential to interstate commerce and one for which Congress has shown special concern (App. A, *infra*, pp. 4a-10a).

REASONS FOR GRANTING THE WRIT

The court of appeals' holding in this case adds a new and undefined element to the offense of extortion affecting interstate commerce. This decision, if permitted to stand, will create great uncertainty as to the scope of the Hobbs Act, a major federal criminal statute, and will substantially impair federal prosecutions for extortions affecting interstate commerce. Moreover, the court's conclusion that only conduct constituting "racketeering" falls within the Act disregards the broad language of the statute, is not supported by the legislative history, and conflicts with decisions in other circuits. The issue presented here is important to the proper administration of the federal criminal laws, and it warrants review by this Court.

1. The Hobbs Act is not expressly limited to "racketeering" activities. It is instead written in comprehensive terms: "Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or

both." 18 U.S.C. 1951(a). As this Court has noted, the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215.[2] Punishment of respondent's attempt to extort $100,000 from a federally insured bank fits comfortably within the ambit of Congress' power and responsibility to protect the channels of interstate commerce, and this is so quite apart from whether petitioner is a "racketeer," whatever that term may mean.

2. Although the primary purpose of the Hobbs Act was to proscribe violence accompanying unlawful labor related activities,[3] the Act was not limited to this end. The Act's sponsor, whose views are entitled to substantial weight (*United States* v. *Mine Workers*, 330 U.S. 258, 279-280), stated (89 Cong. Rec. 3217 (1943)):

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion * * *. It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion.

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[2] *United States* v. *Enmons*, 410 U.S. 396, 408, which holds that the Act does not reach the use of force to achieve "legitimate collective-bargaining demands," made no finding that "racketeering" is an element of a Hobbs Act offense.

[3] See *United States* v. *Enmons*, *supra*, 410 U.S. at 401-410, for a review of that aspect of the statute's legislative history and its judicial interpretation by this Court.

This conception of the broad purpose of the Act was echoed by many of its proponents in Congress. See 89 Cong. Rec. 3206-3212 (1943) (remarks of Congressmen Fellows, Springer, and Jennings); 91 Cong. Rec. 11842-11844, 11904-11911 (1945) (remarks of Congressmen Robsion, Michener, Hancock, Gwynne, and Vursell); see also *United States* v. *Golay*, C.A. 8, No. 76-1166, decided June 24, 1977, slip op. 4. In contrast, when Congress intended to make "racketeering" an essential element of an offense, it did so explicitly (see 18 U.S.C. 1961 *et seq.*). It did not do so in the Hobbs Act.

3. Moreover, with the single exception of *United States* v. *Yokley*, 542 F. 2d 300 (C.A. 6), the decision below stands alone among the many appellate decisions in the more than 30 years since enactment of the Hobbs Act in requiring allegation and proof of "racketeering" as an element of the offense. The result in this case is entirely inconsistent with this accumulated jurisprudence (see, *e.g.*, *United States* v. *Pearson*, 508 F. 2d 595 (C.A. 5); *United States* v. *Price*, 507 F. 2d 1349 (C.A. 4); *United States* v. *Augello*, 451 F. 2d 1167 (C.A. 2)) and is in direct conflict with at least two court of appeals' decisions that explicitly considered and rejected the argument successfully advanced by respondent below. *United States* v. *Golay*, *supra*; *United States* v. *Caci*, 401 F. 2d 664 (C.A. 2).

Indeed, the Ninth Circuit itself had previously taken the view that "extortion in *any* area is included [within the coverage of the Hobbs Act] so

long as the necessary effect upon commerce results," *Carbo* v. *United States*, 314 F. 2d 718, 732, certiorari denied, 377 U.S. 953 (emphasis added), and it had quite recently affirmed a Hobbs Act conviction for extortion from a bank in circumstances almost identical to those present here. *United States* v. *Greiser*, 502 F. 2d 1295; see also *United States* v. *Snell*, 550 F. 2d 515, 518-519 n. 7 (C.A. 9).

4. The court of appeals' decision in this case, taken with *Yokley*, thus constitutes a radical departure from prior interpretations of the Hobbs Act, and the uncertainties thereby created are so substantial that they threaten to undermine future use of the Act, at least in the Sixth and Ninth Circuits.[4]

a. The most glaring question left open by these cases is the meaning of the term "racketeering activity." Section 1951 contains no definition of racketeering activity, and the court of appeals supplied none. A related law, the Anti-Racketeering Statute, 18 U.S.C. 1961 *et seq.*, contains a detailed definition of the term: in that statute "racketeering activity" means any act or threat involving certain enumerated crimes, *including extortion*, and any act that is indictable under a number of federal statutes, including Section 1951. The court of appeals evidently did not intend to incorporate that definition, however, since respondent's conduct constituted "racketeering"

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[4] The decision in this case has already led to the dismissal of at least one significant extortion prosecution within the Ninth Circuit. See *United States* v. *Curran*, N. D. Cal., No. 77-186 RHS, decided May 18, 1977.

as defined in Section 1961, yet his conviction was reversed.

The court's failure to define "racketeering" not only jeopardizes future enforcement of the Hobbs Act, but it may well render the statute unconstitutionally vague. "Racketeering" is not a word with a commonly accepted meaning. See, *e.g.*, *United States* v. *Fabrizio*, 385 U.S. 263, 267, where, in rejecting the claim that a statute prohibiting the interstate transportation of gambling paraphernalia (18 U.S.C. 1953), which used the word "whoever," was restricted to persons connected with organized crime or participating in an illegal gambling or lottery enterprise, the Court observed that a "statute limited without a clear definition of the covered group * * * might raise serious constitutional problems."

b. The court of appeals' opinion also leaves open the question whether there is an unintended gap in the protections accorded to federally insured banks. As the facts of this case demonstrate, the federal bank robbery statute, 18 U.S.C. 2113, is not a comprehensive scheme for prosecuting *all* wrongful takings of bank assets. An attempted taking of assets by means of threats or violence apparently comes within that statute only if the attempt is to take "from the person or presence of another." [5] As Judge Carter explained (App. A, *infra*, p. 10a):

[5] While we so conceded and the court so held in this case, at least one court of appeals apparently has reached a contrary conclusion. See *Brinkley* v. *United States*, C.A. 8, No. 76-1418, decided June 24, 1977.

> A successful extortionist, if not subject to prosecution under the Hobbs Act, could only be convicted of bank larceny under 18 U.S.C. § 2113 (b), with the threats of violence going unpunished. * * * And one who unsuccessfully attempts extortion against bank property, as here, could not be prosecuted at all under any federal statute. I cannot believe Congress intended to have this glaring hole in our criminal law.

c. Finally, neither this case nor *Yokley* determines whether "racketeering" is an element of each of the classes of cases included in Section 1951. *Yokley* dealt with the robbery aspect of the statute, and this case with extortion by threats of violence. Section 1951 also includes, for example, extortion "under color of official right." At least one indictment charging ten policemen with conspiracy to extort money by use of their official positions has already been dismissed for failure to allege facts constituting "racketeering." *United States* v. *Curran*, N.D. Cal., No. 77-186-RHS, decided May 18, 1977.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1860

UNITED STATES OF AMERICA, APPELLEE

v.

DONALD LAVERN CULBERT, APPELLANT

Feb. 23, 1977

Before ELY, CARTER and GOODWIN, Circuit Judges.

OPINION

PER CURIAM:

Culbert was convicted, in a jury trial, of two offenses charged in an indictment consisting of two Counts. Count One charged an attempted bank robbery in violation of 18 U.S.C. § 2113(a) (Supp. 1976). Count Two charged an attempt to obstruct, delay, and affect commerce by robbery, extortion, and threats of physical violence, in violation of 18 U.S.C. § 1951 (1970) (hereinafter the "Hobbs Act" or "Act"). We reverse.

Section 2113(a), germane to the first Count, specifies, as one of the elements of the pertinent offense, a taking or attempted taking "from the person or presence of another." The prosecution's evidence was to the effect that Culbert and an accomplice attempted to extort $100,000 from a bank by means of

telephoned threats of physical violence. The instructions given to the bank's president were that he should drop the money at a specified site and then return to the bank. Thus, the criminal plan did not contemplate a trespassory taking "from the person or presence of" the bank president or any other person. Absent proof of that essential element of the offense charged in Count One, the judgment of conviction of the offense alleged in that Count must necessarily be vacated. *See United States* v. *Howard*, 506 F.2d 1131, 1133 (2d Cir. 1974); *United States* v. *Marx*, 485 F.2d 1179, 1182 (10th Cir. 1973), *cert. den.*, 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1974) (stating that § 2113(a) is not directed toward the crimes of extortion and obtaining of money by false pretenses). It should be noted that Government counsel, both in their written brief and in oral argument, conceded, with commendable candor, that Culbert's conviction on Count One should be vacated for the reason above set forth.

For entirely different reasons, the conviction based upon Count Two of the indictment cannot stand. The Hobbs Act, in its present form, is a codification of a 1946 enactment which amended the so-called "Federal Anti-Racketeering Act of 1934." The legality of Culbert's conviction under the Hobbs Act depends upon whether the fact alleged and proved fall within the scope of the Act, which, in pertinent part, provides:

> "(a) *Whoever in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * *
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. . . ." (Emphasis supplied.)

The Sixth Circuit recently examined, with the utmost care, the legitimate scope of the Hobbs Act. *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976). The court there concluded that, "although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act." *Id.* at 304. A review of the Act's legislative history reveals, without question, that this was the Congressional intent; thus, we adopt the reasoning of the Sixth Circuit's eminently sensible opinion. Given the applicable *de minimis* burden on interstate commerce rule (*See United States* v. *Shackelford*, 494 F.2d 67, 75 (9th Cir.), *cert. denied*, 417 U.S. 934, 94 S.Ct. 2647, 41 L.Ed.2d 237 (1974) a contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history

also emphasized in *Yokley*, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty.

Here, the facts do not suggest that the attempted extortion of the bank assets related, in any way, to "racketeering." Consequently, the offensive activity fell within the exclusive criminal jurisdiction of the state of California.

The judgments of conviction are

REVERSED.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

I concur in the reversal of Count 1 (Robbery), but dissent from the reversal of Count 2 (Extortion).

The plain and unambiguous language of the Hobbs Act (18 U.S.C. § 1951) prohibits any robbery or extortion or attempt to rob or extort which has the requisite effect on commerce. In *Stirone* v. *United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Supreme Court noted:

> "The [Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws such interference 'in any way or degree.'" *Id.* at 215, 80 S.Ct. at 272.

I must disagree with the majority, therefore, in their conclusion that the Hobbs Act is limited to "racketeering."

Even the legislative history of the Act does not so limit its coverage. Representative Hobbs described the purpose of his bill this way:

> "This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion. . . . It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion." 89 Cong. Rec. 3217.

See also United States v. *Green*, 350 U.S. 415, 419, 76 S.Ct. 522, 100 L.Ed. 494 (1956) (amended Act designed to avoid narrow judicial construction of prior Act).

This court has previously recognized the broad reach of the Hobbs Act. In *Carbo* v. *United States*, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964), the court stated:

> "Undeniably the act [sic] was particularly aimed at labor racketeering, but by its terms is not so limited. Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice that extortion in any area is included so long as the necessary effect upon commerce results." 314 F.2d at 732.

This court also has previously affirmed, without discussion of the reach of the Act, the conviction of a person under the Hobbs Act for an attempted extor-

tion from a bank almost identical to the one in this case. *See United States* v. *Greiser*, 502 F.2d 1295 (9 Cir. 1974). I believe we should follow these precedents.

The majority states that upholding the extortion conviction on Count 2 "would justify federal usurpation of virtually the entire criminal jurisdiction of the states" and would constitute "an extraordinary and unprecedented encroachment into the realm of state sovereignty."

The majority ignores the extent to which Congress has relied on interstate and foreign commerce to provide a jurisdictional basis for criminal statutes. *See*, *e.g.*, the Dyer Act (18 U.S.C. § 2312); the Mann Act (18 U.S.C. §§ 2421-24); transportation of firearms by an ex-convict, fugitive, or drug user or addict (18 U.S.C. § 922(g)(1), (2), and (3)). Congress has enacted a long list of statutes based on the Commerce clause.[1] The majority's comment of "usurpa-

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[1] 18 U.S.C. § 32. Destruction of aircraft or aircraft facilities;
18 U.S.C. § 33. Destruction of motor vehicles or motor vehicle facilities;
18 U.S.C. §§ 42 and 43. Importation of mammals, birds and fish;
18 U.S.C. § 224. Bribery in sporting events;
18 U.S.C. § 231. Civil disorders;
18 U.S.C. § 542. Entry of goods into commerce by false statements;
18 U.S.C. § 545. Smuggling or importing goods into the United States;
18 U.S.C. § 546. Smuggling goods into foreign countries;
18 U.S.C. § 659. Thefts from interstate or foreign commerce;

tion" and "unprecedented encroachment" is an exaggeration, to say the least, in view of these many statutes.[2]

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18 U.S.C. § 660. Offense by officer or director of corporations engaged in commerce;
18 U.S.C. § 832. Transportation of explosives, etc. in commerce;
18 U.S.C. § 833. Marking packages containing explosives;
18 U.S.C. §§ 834, 836, and 837. Violation of regulations of I.C.C.;
18 U.S.C. § 875. Transportation of demand for ransom or reward;
18 U.S.C. §§ 921 and 922. Firearms;
18 U.S.C. §§ 1073 and 1074. Travel in commerce to avoid prosecution or giving testimony;
18 U.S.C. § 1084. Wagering information transmitted in commerce;
18 U.S.C. §§ 1201 and 1202. Kidnapping, ransom;
18 U.S.C. § 1231. Transportation of strikebreakers;
18 U.S.C. § 1301. Importing or transporting lottery tickets;
18 U.S.C. § 1407. Narcotic addict or violator—border crossing;
18 U.S.C. §§ 1461-65. Obscenity;
18 U.S.C. § 1761. Transportation or importation of prison goods;
18 U.S.C. § 1821. Transportation of dentures;
18 U.S.C. §§ 1951 and 1952. Hobbs Act (the statute here involved);
18 U.S.C. § 1953. Transportation of wagering paraphernalia;
18 U.S.C. § 1992. Train wrecking;
18 U.S.C. § 2101. Riots;
18 U.S.C. § 2117. Breaking or entering carrier facilities;
18 U.S.C. §§ 2311-17. Transportation of stolen property;
18 U.S.C. § 2510, *et seq.* Wire interception.

[2] Many of the statutes have a companion section on lack of preemptive intent by Congress. 18 U.S.C. § 233 is a good example.

[Footnote continued on page 8a]

A second basis for jurisdiction, interference with a federal function or officer, underlies an equally large number of federal statutes. Examples are bankruptcy offenses (18 U.S.C. §§ 151-55); postal offenses (18 U.S.C. §§ 1691-734); and offenses involving federally insured banks and building and loan associations (18 U.S.C. § 2113). Together, crimes involving interstate and foreign commerce or interference with a federal function or officer encompass most federal crimes.[3]

The true question in this case is whether a federally insured national bank is involved in interstate commerce so as to fall within the jurisdictional parameters of this federal criminal statute. It is obvious that the banking industry vitally affects interstate commerce. Furthermore, a federally insured national bank specifically comes within the statutory definition of commerce because the United States has exclusive jurisdiction over banks and banking by

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[2] [Continued]

"Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof."

Thus, Congress preserved state jurisdiction in the area while extending federal jurisdiction.

[3] Additional bases for federal jurisdiction of crimes are (1) the tax power (*e.g.*, income tax offenses, tax on transfers of machine guns, etc.); and (2) maritime and territorial jurisdiction (18 U.S.C. §§ 7 and 13; 18 U.S.C. §§ 113-14).

virtue of Title 12 of the United States Code. Congress has evidenced its concern over crimes against banks by passing a specific bank robbery statute, 18 U.S.C. § 2113.

The section begins: "§ 2113 *Bank robbery and incidental crimes.*" Various crimes are listed in addition to robbery, *e.g.*, attempts, entry to commit a robbery, stealing money or property of the bank, receiving or dealing with the money or property stolen or carried away from the bank, and assaults in committing either robbery (subsection (a)) or theft (subsection (b)).

However, the Congress, in enacting 18 U.S.C. § 2113, did not deal specifically with extortion. *See United States* v. *Marx*, 485 F.2d 1179 (10 Cir.), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1973).

We need not today decide whether every extortion occurring in interstate or foreign commerce should be included within the scope of the Hobbs Act. In our case, a federally insured bank is involved. It is the kind of a federal institution customarily protected by federal statutes from interference. It is also engaged in interstate commerce. Hence, it warrants protection against attempted extortion more than an ordinary commercial institution. It is no great extension of federal jurisdiction to hold that the extortion conviction on Count 2 is valid.

Our court is not bound by *United States* v. *Yokley*, 542 F.2d 300 (6 Cir. 1976), relied upon by the majority. Moreover, the case is distinguishable. It in-

volved an actual robbery of a "K-Mart" department store. Federal jurisdiction has not been extended (except as possibly extended by the Hobbs Act) to protection of department stores. Protection of a federally insured national bank is quite a different thing.

The majority's position results in an anomaly in the coverage by our criminal statutes. A successful extortionist, if not subject to prosecution under the Hobbs Act, could only be convicted of bank larceny under 18 U.S.C. § 2113(b), with the threats of violence going unpunished. Such a person would be subject to the 10-year maximum penalty under 18 U.S.C. § 2113(b), rather than the 20-year penalty under 18 U.S.C. § 2113(a) when force is used. And one who unsuccessfully attempts extortion against bank property, as here, could not be prosecuted at all under any federal statute. I cannot believe Congress intended to have this glaring hole in our criminal law.

I would affirm the conviction on Count 2, but agree with the majority on Count 1 and would reverse that conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1860

DC# CR 75-421 LHB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DONALD LAVERN CULBERT, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is reversed.

Filed and entered February 23, 1977.

APPENDIX C

UNITED STATES COURH OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1860

[Filed May 27, 1977, Emil E. Melfi, Jr.,
Clerk, U.S. Court of Appeals]

UNITED STATES OF AMERICA, APPELLEE

v.

DONALD LAVERN CULBERT, APPELLANT

ORDER

Before: ELY, CARTER, and GOODWIN, Circuit Judges.

The majority of the panel in the subject case (Ely and Goodwin) has voted to deny the Petition for Rehearing. Judge Carter, the third member of the panel, would grant panel rehearing. Judges Ely and Goodwin vote to reject the suggestion for en banc rehearing, and Judge Carter recommends that such suggestion be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en-banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX D

JAMES L. BROWNING, JR.
United States Attorney
Attorney for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Criminal No. CR-75-421 LHB

[Filed Jun. 5, '75, William A. Whittaker, 746 AM,
Clerk, U.S. District Court, No. Dist. of Ca.]

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD LAVERNE CULBERT AND
THEODORE RAMON HOUSER, DEFENDANTS

VIOLATIONS: Title 18 U.S.C. Section 2113(a)-Bank Robbery; Title 18 U.S.C. Section 1951(a) Interference with Commerce by Threats of Physical Violence

INDICTMENT

COUNT ONE: (Title 18 U.S.C. § 2113(a))

The Grand Jury charges: THAT

On or about April 11, 1975, in the County of Marin, State and Northern District of California,

DONALD LAVERNE CULBERT and
THEODORE RAMON HOUSER,

defendants herein, did by the intimidation of a threatened bomb detonation, attempt to take from the person of William P. Murray, President, Bank of

Marin, San Rafael, California money in excess of $100 belonging to and in the care, custody, control and possession of the aforesaid bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation.

COUNT TWO: (Title 18 U.S.C. § 1951(a))

The Grand Jury further charges: THAT

On or about April 11, 1975, in the County of Marin, State and Northern District of California,

DONALD LAVERNE CULBERT
and THEODORE RAMON HOUSER,

defendants herein, did attempt to obstruct, delay and affect the commerce and the movement of a commodity in commerce, to wit: $100,000.00 in United States currency belonging to and in the care, custody, control and possession of the Bank of Marin, San Rafael, California, by robbery and extortion and threatened physical violence to persons and property by detonation of a bomb in the home of William P. Murray and in the Bank of Marin in furtherance of their planned robbery and extortion.

A True Bill.
/s/ [Illegible]
Foreman

/s/ James L. Browning, Jr.
JAMES L. BROWNING, JR.
United States Attorney

APV'D as to form JL
AUSA:LOCKIE

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 239650 34

No. 77-142

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-142

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

---

1. The court of appeals' novel interpretation of the Hobbs Act, 18 U.S.C. 1951, in this case has recently been rejected by two courts of appeals in cases not cited in the government's petition. In *United States* v. *Warledo*, 557 F. 2d 721, 730 (C.A. 10), the Tenth Circuit rejected the contention that the Hobbs Act is limited to labor racketeering, concluding that "[t]he Act proscribes all forms of extortion affecting interstate commerce." And in *United States* v. *Frazier*, C.A. 8, No. 77-1195, decided August 5, 1977, the Eighth Circuit expressly refused to follow the decision in the instant case on facts nearly identical to those here. Frazier, like petitioner, attempted to extort money from a federally insured bank by means of threats to blow up a bank employee or his family. The court concluded "that the Hobbs Act means what it says" and that it was "unpersuaded that anything in the legislative history of the Act requires a more restrictive interpretation" (slip op. 4).

As respondent himself concedes (Mem. in Opp. 4), the law on the scope of the Hobbs Act is now uncertain, and the conflict between the circuits is clearly established.[1] Because this uncertainty will substantially impair federal prosecutions under this major criminal statute, this issue warrants review.

2. Petitioner contends, however, that the limitation by the Ninth Circuit of the Hobbs Act to racketeering is essential to prevent "a broad encroachment on the sovereignty of the states" (Mem. in Opp. 4-5). Whatever the merit of respondent's argument with regard to hypothetical Hobbs Act prosecutions for the hold up of a neighborhood liquor or grocery store, where there may be a "de minimus burden on interstate commerce" (Mem. in Opp. 4), the facts of this case demonstrate a clear federal interest in the protection of a federally insured bank, surely one of the primary channels of interstate commerce. As the instant case and *United States* v. *Frazier, supra,* demonstrate, many prosecutions under the Hobbs Act involve this unquestionable nexus with interstate commerce. Indeed, respondent has suggested only one example[2] to support his contention that the danger of a wholesale invasion of state sovereignty is so great that it requires the judiciary to add the new and undefined element of "racketeering" to the Hobbs Act.

---

[1]Since the filing of our brief the Ninth Circuit has dismissed another Hobbs Act prosecution under the authority of *Culbert. United States* v. *Missman,* C.A. 9, No. 77-1106, decided August 3, 1977.

[2]*United States* v. *Yokley,* 542 F. 2d 300 (C.A. 6). The indictment charged that Yokley and a confederate forced their way into the home of the manager of a K-Mart store. One gunman held the family hostage while the other accompanied the manager to the store, where he forced the manager to open the safe. 542 F. 2d at 301-302.

Moreover, even if respondent is correct and there are some fact situations falling within the literal language of the Hobbs Act but in which there is no substantial federal interest, requiring proof of racketeering will not serve to screen out such cases. Although the court of appeals has not clearly defined racketeering, there is nothing inherent in the concept that suggests that racketeers would prey only upon businesses heavily involved in interstate activities or that the concept would otherwise meaningfully restrict Hobbs Act prosecutions to crimes in which the federal government may be thought to have a substantial rather than a slight interest. The requirement that the government prove racketeering thus seems to have little or nothing to do with a legitimate concern for state sovereignty.

For the reasons discussed in this memorandum and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

DOJ-1977-09

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-142

UNITED STATES OF AMERICA,
Petitioner,

—v.—

DONALD LAVERN CULBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 26, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-142

UNITED STATES OF AMERICA,

Petitioner,

—v.—

DONALD LAVERN CULBERT

ON WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DOCKET ENTRIES

6/5/75 ORD: indictment filed. N.P. Houser to app 6/20/75 and Culbert to app. 6/9/75 before Mag. Woodruff. Filed Indictment

7/11/75 ORD: defts pres, ea pl NOT GUILTY to all cts, pltf's mo for exemplars granted., contd to 9-8-75, 11AM for jr tr.

3/8/75 Stipulation re Bank of Marin.

3/15/75 Verdict of guilty to counts 1 and 2 as to deft CULBERT.

3/17/75 Deft CULBERT's notice and motion for new trial, arrest of judgment and acquittal, 4-9-76/11am.

4/9/75 MINUTE ORDER: Deft CULBERT sentenced to custody of A/G for 4 yrs, exec of sent. stayed until response on appeal; deft to remain on same bail. Motion for new trial—DENIED.

4/15/75 Entered JUDGMENT as to deft CULBERT (filed 4-14-76).

4/15/75 Deft CULBERT's notice of appeal. Mailed notices to parties of record.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE LLOYD H. BURKE, JUDGE

No. CR-75-421 LHB

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

DAVID LAVERNE CULBERT, DEFENDANT.

* * * *

[2] APPEARANCES:

For the Plaintiff:

JAMES L. BROWNING, JR.,
United States Attorney

BY: JOHN LOCKIE,
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

For the Defendant:

JAMES F. HEWITT,
Federal Public Defender

BY: FRANK O. BELL, JR.,
Assistant Federal Public Defender
450 Golden Gate Avenue
San Francisco, California 94102

* * * *

[24] [DIRECT EXAMINATION OF
WILLIAM PAUL MURRAY]

BY MR. LOCKIE:

Q. How long have you been in banking, Mr. Murray?
A. Oh, about 25 years.

Q. I see, and which bank are you involved with at the present time?
A. At the present time it is the Bank of Marin.
[25] Q. How long have you been with them?
A. Since 1962.
Q. In what capacity?
A. President.

* * * *

Q. Do you have customers who deal with the Bank of Marin who are not residents of California?
A. Oh, yes, for deposit accounts.
[26] MR. BELL: I would object to this testimony on the grounds of relevancy, and I would like to approach the bench if there is any question on the relevancy.
THE COURT: I assume this is directed to the question of whether the bank is involved in interstate commerce?
MR. BELL: We will stipulate it is insured by the FDIC, and there is a question of relevance as set out in the indictment. I would like to be heard on that point.
THE COURT: He may answer. Do you have out-of-state customers?
THE WITNESS: Right, deposit accounts, loans, Master Charge, stockholders.
MR. LOCKIE: Q. Do you conduct business outside the State of California?
A. Yes, in that these people are located outside the state, and we loan with them, or they have accounts with us, or they are holders of Master Charge cards, or stockholders.
Q. Would you speak up so everyone in the jury box can hear you?
A. We do have clients out of the State of California through loans, through deposit accounts, stockholders, holders of our Master Charge cards traveling throughout the United States and world, as a matter of fact.
Q. Have you purchased bonds from other states?
A. Yes, we as a bank, you know, hold municipal bonds. [27] We have bonds from various states and cities throughout the United States.

MR. BELL: Your Honor, I hate to interrupt, but I do feel it is necessary. I would like to make the same objection to this testimony on the same ground of relevancy.

THE COURT: Sure. It is on the record.

MR. LOCKIE: Q. How many state bonds do you hold, approximately?

A. State of California or just municipal bonds in general?

Q. Other states' municipal bonds issued in other states.

A. In other states, I would be estimating three or four million dollars, probably.

* * *

[286] THE COURT: In the absence of the jury, Mr. Bell.

MR. BELL: Your Honor, at this time, at the close of the Government's case, I would like to make a motion for judgment of acquittal in this matter. Part of it is set out, or most of it is set out in the formal motion which I have filed just now with the court, and I have provided a copy to Mr. Lockie. I realize, in a sense, it is unfair because he has not had a chance to read or respond to it.

* * *

[300] THE COURT: Well, I think we can cut this short. The jury is waiting. This is a well-prepared memorandum, Mr. Bell, and I think there is more than superficial logic in the arguments made. However, I think that the facts of the case are such to bring the charge within the contemplated scope of the bank robbery statute.

I am of the opinion that as far as the Second Count is concerned, probably the use of the Hobbs Act is an extention not really contemplated by Congress at the time the legislation was enacted, but the language is probably broad enough to allow its utilization in this case.

So the motion for judgment on acquittal on each of the two counts is denied.

* * *

[322] [MR. BELL]: * * * No. 18 I do have an objection to. I didn't offer any alternative. I object to that instruction.

> "Interstate commerce may be 'adversely affected,' within the meaning of these instructions, by an increase of the cost of doing business in interstate commerce, or by the reduction of the profits from interstate business. It is not necessary to show an actual interruption or delay."

I just submit that is too broad an interpretation of interstate commerce.

THE COURT: Let the jury figure out what "adversely affected" is.

[323] MR. BELL: So this one is not given?

THE COURT: No, I won't give it.

MR. LOCKIE: May I suggest an alternative instruction, Your Honor. I suggest that we instruct the jury that extortion or threats of violence need affect interstate commerce only in a minimum degree to constitute a violation of Title 18, United States Code 1951.

THE COURT: I will let them figure that out.

* * *

[INSTRUCTIONS TO THE JURY]

[408] * * * It is stipulated and agreed that the Bank of Marin, San Rafael, California, is a banking institution organized and operating under the laws of the United States, and a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation at the time of the offenses alleged in the indictment.

* * *

[414] 18 U.S. Code Section 1951, Subdivision B, Paragraph 2 defines extortion as follows: "As used in this section, the term extortion means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." The term fear does not necessarily refer to physical fear or fear of violence. It

includes fear of economic loss. It is not necessary for the Government to show that the defendant intended to specifically obstruct, delay or affect interstate commerce. All that is necessary as to this issue is that the Government's evidence prove that the defendant intended to commit an act proscribed by the statute, the natural consequences of which would be to obstruct, delay or affect commerce.

• • •

No. 77-142

UNITED STATES, PETITIONER,

v.

DONALD LAVERN CULBERT

ORDER ALLOWING CERTIORARI

Filed October 3, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 249786 88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-142

UNITED STATES OF AMERICA,

PETITIONER,

v.

DONALD L. CULBERT,

RESPONDENT.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES F. HEWITT
Federal Public Defender
450 Golden Gate Avenue
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Telephone: (415) 556-7712

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-142

UNITED STATES OF AMERICA,

PETITIONER,

v.

DONALD L. CULBERT,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Respondent, DONALD L. CULBERT, pursuant to Rule 53 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Memorandum in Opposition to Petition for Writ of Certiorari without prepayments of costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the District Court and on the appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: August 24, 1977

Respectfully submitted,

JAMES F. HEWITT
Federal Public Defender

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-142

UNITED STATES OF AMERICA,

PETITIONER,

v.

DONALD L. CULBERT,

RESPONDENT.

MEMORANDUM IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Put simply, the issue is whether the Hobbs Act, 18 U.S.C. §1951, may be interpreted so broadly that a neighborhood liquor store holdup becomes a federal offense. If the interpretation of the Act urged upon this Court in the government's Petition for Writ of Certiorari is correct, that will be its certain effect.

Obviously, the statute was aimed at protecting interstate shippers from hijacking and "shakedowns." Most of the heated debates surrounding the 1946 amendment focused on whether the proposed bill was directly aimed at labor (the Teamster's Union for the most part), or whether it applied to "anyone" engaged in extorting payments from interstate

truckers who were not members of local unions.[1] The insistence by various members of Congress that the bill was aimed at "all" persons was generally in response to the oft-voiced opposition that the bill was "anti-labor," and was supported by the proponents as a frontal attack on the labor movement. The legislative history is clear in one respect: the bill was intended to apply to the interstate shipping industry as it was then known, and certainly not in the same context as we presently consider interstate commerce by application of the de minimus contact rule.

While courts are unable to apply a different definition of "commerce" to Hobbs Act prosecutions, the Sixth and Ninth circuits have sought to limit an overbroad application of the Act by requiring a showing that some activity tantamount to "racketeering" is involved.[2] Only by such judicially engrafted restrictions can the statute be applied without violence to the well established principle of federalism against usurpation of a state's criminal jurisdiction. The conduct complained of below is proscribed by state law.[3] But for the lack of any element of taking from the person, it could have been an attempted bank robbery. Had the crime

---

1/ This Court discussed the legislative framework of the Hobbs Act in United States v. Enmons, 410 U.S. 396 (1973).

2/ United States v. Yokley, 542 F.2d 300 (6th Cir.1974)

3/ Extortion is a violation of the California Penal Code, §518, 520.

been completed, without a taking from the person, it could have been a bank larceny.[4]

A holding that any robbery or extortion of a victim engaged in "commerce" (as that term is now interpreted) would violate the Hobbs Act, would surely be "an extraordinary and unprecedented encroachment into the realm of state sovereignty." (Opinion, Appendix to Petition, p. 4a) Absent a clear Congressional declaration that a federal criminal statute is intended to result in such an incursion into the criminal jurisdiction of the states, any ambiguities must be resolved in favor of the accused.[5]

4/ In United States v. Snell, 550 F.2d 515 (1977), the Ninth Circuit held the Hobbs Act inapplicable to an extortion plot which contemplated a taking from the presence of the bank employee. Since the planned conduct came within the definition of bank robbery, a conspiracy conviction was affirmed. See also United States v. Beck, 511 F.2d 997 (6th Cir.1975), where a conviction of bank larceny [18 U.S.C. §2113(b)] was affirmed. While in Beck there was no taking "from the presence" to constitute robbery, there was a "taking" sufficient to support the larceny conviction. Since the conduct clearly fell within the purview of §2113(b), the Hobbs Act conviction was reversed since the bank theft statute exclusively proscribed the conduct within its coverage.

United States v. Greiser, 502 F.2d 1295, cited by the petitioner (Petition, p. 9) as a decision affirming a Hobbs Act conviction "in circumstances almost identical to those present here," did not consider the question of whether the conduct fell within the ambit of 18 U.S.C. §1951. It can hardly be cited to support an issue not considered by the Court. Upon analysis, the Greiser decision is in conflict with the later decision of the Ninth Circuit in Snell, supra, (cited in Petition, p. 9) holding conduct almost identical to be pre-empted by the bank robbery statute, 18 U.S.C. §2113(a), where the taking is from the physical presence of the bank employee.

5/ This Court discussed the legislative framework of the Hobbs Act in United States v. Enmons, 410 U.S. 396 (1973).

On the general subject of interpretation of federal criminal statutes, this Court said:

> Since there is no common law offense against the United States [citations omitted], the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law . . .
>
> Jerome v. United States, 318 U.S. 101 at p. 104-105.

There are occasions when specific conduct, albeit reprehensible, does not fall within the ambit of a particular federal statute. See, for example, LeMasters v. United States, 378 F.2d 262 (9th Cir.1967) holding that obtaining money from a bank under false pretenses is not a federal crime. The remedy is with Congress; not with a judicial interpretation which will work such an expansion of federal jurisdiction.

CONCLUSION

Respondent concedes that the law is unclear on the scope of the Hobbs Act. Perhaps if the prosecutions were limited (as Congress obviously intended) to hijacking and racketeering having a direct affect on the right to freely transport goods in interstate commerce, rather than seeking to expand federal criminal jurisdiction to a holdup of a K-Mart Department Store by two robbers with a de minimus burden on interstate commerce (Yokley, supra), the issue would lend itself to easy resolution. While there may be need to "plug the loophole," so to speak, it should not be at the expense of such a broad encroachment on the sovereignty

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of the states. The Petition for Writ of Certiorari should be denied.

DATED: August 24, 1977

Respectfully submitted,

JAMES H. HEWITT
Federal Public Defender

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-142

UNITED STATES OF AMERICA,

PETITIONER,

v.

DONALD L. CULBERT,

RESPONDENT.

CERTIFICATE OF SERVICE

STATES OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

James F. Hewitt, a member of the bar of this Court, certifies that pursuant to Rule 33 he served the within Motion for Leave to Proceed in Forma Pauperis and Memorandum in Opposition to Petition for Writ of Certiorari on the counsel for petitioner by enclosing a copy thereof in an envelope, postage prepaid addressed to:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and depositing same in the United States mails at San Francisco, California, on August 24, 1977, and further certifies that all parties required to be served have been served.

JAMES F. HEWITT

No. 77-142

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
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WILLIAM G. OTIS,
WILLIAM C. BROWN,
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Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–142

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 548 F.2d 1355.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 23, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 27, 1977 (Pet. App. C). On June 20, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 26, 1977, and the petition was

filed on that date. The petition for a writ of certiorari was granted on October 3, 1977 (A. 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether conduct within the plain language of the Hobbs Act (18 U.S.C. 1951) is nonetheless not proscribed by that Act unless it is also proven to constitute "racketeering."

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his

> family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a), and attempted obstruction of commerce by extortion and threats of violence, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to four years' imprisonment. The court of appeals reversed, one judge concurring in part and dissenting in part (Pet. App. A).

1. The evidence at trial showed that in March 1975 respondent and an accomplice, Ted Houser, devised a plan to extort $100,000 from the Bank of Marin in San Rafael, California, by means of threats to the

bank president (Tr. 48–51). The bank, which is insured by the Federal Deposit Insurance Corporation, holds "three or four million dollars" of municipal bonds issued in states other than California, and conducts business with out-of-state depositors and borrowers (A. 3–4; Tr. 25–27, 408).

When the FBI learned of the plan through an informant, agents warned the bank's president, William Murray (Tr. 27, 48–52). On April 11, 1975, agents advised Murray that the extortion attempt was imminent and provided him with a package of false currency and a device to record any telephone threats (Tr. 20–23, 30–34, 51–52).

Shortly before noon on April 11, 1975, respondent and Houser were observed, first in a car parked in the vicinity of the bank (Tr. 149–150, 192–193), then following Murray's car when he drove to a lunch appointment (Tr. 153–154). While Murray was at the luncheon meeting, the agents saw respondent and Houser leave their car and stand at the front of Murray's car (Tr. 156–157, 198–199). When Murray returned to the bank, respondent and Houser followed (Tr. 91–92, 129–130). At about 4:00 p.m. Houser telephoned Murray (who recorded the conversation) and told him that remote-controlled bombs had been placed both at the bank and at Murray's home. Houser instructed Murray to remove $100,000 from the bank vault, take it to his car, and then follow the instructions he would find attached to the front bumper. Houser threatened that if his instructions were not followed the bombs would be detonated, "killing your wife and many others. If

you manage to foil this plan, the People's Liberation Army will declare war on your family, your wife and your children will be assassinated one by one" (Gov't. Ex. 1; Tr. 34–35, 347).

Murray put the false currency in a briefcase and went to his car, where he found a note that instructed him to drive to a parking lot in San Anselmo, drop the money behind a Goodwill box, and return to the bank (Tr. 35–39; Gov't. Exs. 2 and 3). Respondent's fingerprint was on this note (Tr. 238–245).

Murray followed the instructions and left the briefcase in the parking lot (Tr. 38–39, 205–207, 220–223). Moments before Murray arrived at the parking lot, government agents saw the automobile that respondent and Houser had used earlier drive slowly by and observed that one of its occupants was wearing clothes like those respondent had been seen wearing earlier (Tr. 194, 222–223). A few minutes after Murray left the briefcase, it was discovered by two boys, who opened it and tore open the packages of false currency (Tr. 206–208).

2. On appeal, the United States Attorney confessed error on the bank robbery count,[1] and a divided panel reversed respondent's conviction on the charge of attempted extortion. The majority opinion did not dispute that respondent's conduct constituted an at-

[1] The government agreed that 18 U.S.C. 2113(a) does not apply unless the taking of the bank's money is "from the person or presence of another," and that respondent's plan did not contemplate any trespass into the bank or a taking of the money from the person or presence of the bank manager. But see note 19, *infra*.

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tempted extortion of bank assets, and thus fell within the language of Section 1951; it nevertheless concluded, relying on the analysis of legislative intent in *United States* v. *Yokley,* 542 F. 2d 300 (C.A. 6), that conduct "must constitute 'racketeering' to be within the perimeters of the [Hobbs] Act" (Pet. App. 3a). The majority asserted that a contrary interpretation would "justify federal usurpation of virtually the entire criminal jurisdiction of the states" (*ibid.*).

Judge Carter dissented from the reversal of respondent's conviction for violation of the Hobbs Act. He pointed out that the "plain and unambiguous language" of the statute prohibits any attempted extortion that has the requisite effect on commerce, and neither the language nor the legislative history of the Act limits its coverage to "racketeering." He found it particularly inappropriate to refuse to apply the Hobbs Act in this case, which involved an industry essential to interstate commerce and one for which Congress has shown special concern (Pet. App. 4a–10a).

SUMMARY OF ARGUMENT

1. The plain language of the Hobbs Act, 18 U.S.C. 1951, which is the primary guide to its meaning, reaches "[*w*]*hoever* in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do" (emphasis supplied). This Court has previously construed this broad language as manifesting Congress's intent to exercise the full extent of its constitutional authority

to punish interference with interstate commerce by robbery or extortion. *Stirone* v. *United States,* 361 U.S. 212, 215. The Act is not limited to—and does not even mention—"racketeering." It thus explicitly proscribes respondent's conduct—the attempted extortion of $100,000 from a federally insured bank—and requires no additional showing that the conduct constituted "racketeering."

2. The legislative history provides no support for the novel construction of the Act adopted by the Sixth Circuit in *United States* v. *Yokley,* 542 F. 2d 300, and followed by the court of appeals in the instant case. The history of the Act of June 18, 1934, 48 Stat. 979, the predecessor to the Hobbs Act, demonstrates that although the investigation that led its passage was the outgrowth of congressional concern regarding gangsters such as Dillinger and so-called "racketeering," the bill proposed and enacted was intended to protect interstate commerce against *all* interference resulting from the actual or threatened use of force, violence, or coercion. Like the Hobbs Act, the 1934 Act was broadly drafted to reach "[*a*]*ny* person who, in connection with or in relation to *any* act in *any* way or in *any* degree affecting trade or commerce * * *" *(emphasis supplied), obtains or attempts to obtain the property of another by use of or threat to use "force, violence, or coercion" (Section 2, 48 Stat. 979–980).

Certainly the fact that the 1934 Act was proposed by the Copeland Committee, which had been authorized to investigate "kidnaping, racketeering, and

other forms of crime" (78 Cong. Rec. 448 (1934)), cannot justify the conclusion that each of the 90 or so bills it proposed was intended to reach only so-called "racketeering" and not all the conduct actually described by the statutory language. Indeed, since the Copeland Committee recognized that the term "racketeering" was being loosely used to describe conduct ranging from violent to fraudulent to merely unpopular, and it found a working definition of the term essential to guide its investigation, it is inconceivable that the Committee would nevertheless attempt to make "racketeering" an element of a criminal offense without defining it.

The 1934 Act was replaced by the Hobbs Act, which was adopted in response to the Supreme Court's construction of the 1934 Act as exempting certain strong arm labor tactics. As with the 1934 Act, neither Committee report suggests any intention to limit the broad language employed in the Act, and the debates make this point even clearer, if possible, reiterating the theme that the Act applies to any person who commits robbery or extortion that obstructs interstate commerce.

The debates also focused on the fact that the crimes of robbery and extortion established in the Act were already punishable under state law. The Act was vigorously opposed as an unwarranted incursion into the policing powers of the states. The proponents agreed that state law already prohibited the conduct proscribed by the Hobbs Act, but they argued that the Act was nevertheless necessary because local enforcement had often proved insufficient to protect interstate commerce. This argument carried the day.

3. Even apart from the legislative history of the Hobbs Act, the court below also concluded that its limiting construction of the Act was necessary to prevent what it viewed as an unwarranted federal usurpation of state criminal jurisdiction. As noted above, however, the debates reflect full congressional awareness that the Hobbs Act proscribed conduct already made criminal by the states, and that Congress nevertheless passed an Act intended to be as broad as Congress's power over interstate commerce. This is not a case in which this Court is being asked to assume or infer that Congress intended to alter the balance of federal-state criminal jurisdiction, but one in which Congress clearly and unmistakeably stated its intent.

In any event, requiring proof of "racketeering" would not serve the purpose of screening out cases in which there is no substantial federal interest. Although the court of appeals did not define "racketeering"—and we can think of no reasonable definition of the term that would exclude respondent's conduct—there is nothing inherent in the concept that suggests that "racketeers" prey only upon persons or businesses heavily engaged in interstate commerce. In fact, the ineffectiveness of the court's construction of the Act as a means of distinguishing between valid and invalid exercises of federal power is highlighted by the result it reached in this very case, which precludes the federal government from prosecuting an

attempt to extort a large sum of money from a bank, one of the major elements of the national commercial structure.

Finally, the judicial creation of an element of "racketeering" in the Hobbs Act should be abjured because the vagueness of the "racketeering" concept would raise grave doubts about the constitutionality of the statute. See *United States* v. *Fabrizio,* 385 U.S. 263; *Lanzetta* v. *New Jersey,* 306 U.S. 451. Where Congress chooses to make "racketeering" an element of a criminal offense, as it did in the Anti-Racketeering Statute (18 U.S.C. 1961 *et seq.*), it may surely be expected, and probably is obliged, to supply a definition of the concept (respondent's conduct would, incidentally, be considered "racketeering" under the definition contained in 18 U.S.C. 1961(1)).

ARGUMENT

EXTORTION AFFECTING INTERSTATE COMMERCE VIOLATES THE HOBBS ACT WHETHER OR NOT IT ALSO CONSTITUTES "RACKETEERING"

A. THE LANGUAGE OF THE HOBBS ACT UNAMBIGUOUSLY COVERS ANY EXTORTION HAVING THE REQUIRED EFFECT ON COMMERCE

From *United States* v. *Wiltberger,* 5 Wheat. 76 (1820), through *Scarborough* v. *United States,* No. 75–1344, decided June 6, 1977, slip op. 6, this Court has recognized that the first guide to the application of a statute is its text. This settled rule of construction is based on the sensible proposition that the best indication of what Congress means is what it says. Where "there is no ambiguity in the words of [the

statute] * * * there is no justification for indulging in uneasy statutory construction." *Barrett* v. *United States,* 423 U.S. 212, 217. Legislative history cannot "be relied upon to * * * add unspecified conditions to statutory language which is perfectly clear." *Pipefitters* v. *United States,* 407 U.S. 385, 446 (Powell, J., dissenting).

The Hobbs Act is not explicitly limited to—and indeed it does not even mention—"racketeering." Instead, it reaches "[*w*]*hoever* in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do * * *." 18 U.S.C. 1951(a) (emphasis supplied). Accordingly, this Court has previously recognized that "there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion." *Stirone* v. *United States,* 361 U.S. 212, 218. As this Court stated in *Stirone, supra,* 361 U.S. at 215, the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." [2]

The Act contains no qualifying words that might exempt persons whose extortionate schemes may not

[2] The use of the phrase "affects commerce" in itself provides a substantial basis for this proposition. "Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'" *Scarborough* v. *United States,* No. 75–1344, decided June 6, 1977, slip op. 8.

amount to "racketeering." Indeed, it is difficult to envision language that would be more encompassing than the word "whoever" used in the Hobbs Act, or what language would be necessary in order to punish all extortion affecting commerce if this language is not sufficient to do so.[3]

Thus the broad and unqualified language of the statute explicitly proscribes respondent's conduct—the attempted extortion of $100,000 from a federally insured bank engaged in interstate commerce—and requires no additional showing that the conduct constituted "racketeering."

B. THE COURTS HAVE CONSISTENTLY ACCORDED THE HOBBS ACT THE BROAD COVERAGE ITS LANGUAGE PRESCRIBES, AND HAVE REJECTED THE "RACKETEERING" LIMITATION IMPOSED BELOW

In more than 30 years since the passage of the Hobbs Act, the ruling below and the Sixth Circuit's decision in *United States* v. *Yokley,* 542 F. 2d 300, stand alone in holding that conduct clearly within the plain language of the Hobbs Act is nonetheless not proscribed by the Act unless it is also proven to constitute "racketeering." Other courts of appeals' decisions have been consistent with this Court's observation in *Stirone* that the "broad language" of the Act manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or

[3] When Congress wished to make "racketeering" an element of a criminal offense, it knew how to say so and also was careful to supply a definition for that amorphous concept. See 18 U.S.C. 1961 *et seq.*

physical violence" (361 U.S. at 215). For example, the Seventh Circuit reasoned as follows in *United States* v. *Staszcuk,* 517 F. 2d 53, 58 (*en banc*), certiorari denied, 423 U.S. 837:

> Like the Sherman Act, which is broadly directed against private regulation of the free market, and which has been construed as an exercise by Congress of "all the power it possessed" to prevent restraints on commercial competition, * * * the purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself.
>
> * * * * *
>
> The primary purpose of the Commerce Clause was to secure freedom of trade, to break down the barriers to its free flow, and to curtail the rising volume of restraints upon commerce that the Articles of Confederation were inadequate to control. A statute which has a purpose which so unambiguously parallels the fundamental purpose of its constitutional predicate must receive an expansive construction.
>
> It is, therefore, not surprising to find that the language of the statute, its legislative history, and its interpretation by the Supreme Court all confirm an intent by Congress to exercise its full powers under the Commerce Clause.

In *United States* v. *Brecht,* 540 F.2d 45, 52 (C.A. 2), the Second Circuit focused on the Act's broad definition of extortion and concluded:

> Since Congress has not limited the scope of extortion save for the statutory definition itself,

> we can formulate no judicial rule that would draw a practical line between one type of extortion that is covered by the Hobbs Act and another type which is not. Moreover, we cannot require, as an element of the offense, the presence of at least two individuals as evidencing the participation of organized crime, for the Hobbs Act definition of extortion is not limited to the crime of conspiracy to extort but deals with the substantive offense which can be committed by a single individual.

Following similar reasoning, the courts of appeals for the Second, Eighth, and Tenth Circuits have each within the past few months expressly rejected the contention that the Hobbs Act reaches, not all extortion or robbery with the requisite effect on interstate commerce, but rather some narrower class of activities constituting "racketeering."

For example, in *United States* v. *Frazier,* 560 F.2d 884, 886 (C.A. 8), petition for a writ of certiorari pending, No. 77–487, which involved facts nearly identical to those in the instant case,[4] the Eighth Circuit expressly refused to follow *Culbert,* concluding "that the Hobbs Act means what it says" and being "unpersuaded that anything in the legislative history of the Act requires a more restrictive interpretation." The Second Circuit found the argument that "activities must amount to 'racketeering' before a Hobbs Act violation can be established * * * totally without

[4] Frazier, like petitioner, attempted to extort money from a federally insured bank by means of threats to blow up a bank employee or his family. *Frazier* reaffirmed the analysis in *United States* v. *Golay,* 560 F. 2d 866, 868 (C.A. 8).

merit." *United States* v. *Daley,* C.A. 2, No. 77–1262, decided October 20, 1977, slip op. 117. The Tenth Circuit likewise rejected this contention, reaffirming without extended discussion its prior decisions holding that the Hobbs Act "proscribes all forms of extortion affecting interstate commerce." *United States* v. *Warledo,* 557 F. 2d 721, 730 (C.A. 10).

C. THE LEGISLATIVE HISTORY OF THE HOBBS ACT SUPPORTS ITS COMPREHENSIVE LANGUAGE AND DEMONSTRATES NO INTENTION ON THE PART OF CONGRESS TO REQUIRE PROOF OF RACKETEERING

The legislative history of the Hobbs Act fully supports the view that Congress intended this broadly worded statute to apply to all extortion or robbery affecting interstate commerce, rather than only to some more limited class of activities constituting "racketeering."

1. Since the Hobbs Act was, in effect, a broadening amendment to the Act of June 18, 1934, 48 Stat. 979, the analysis of the legislative history of the Hobbs Act properly begins with its predecessor.

The history of the 1934 Act[5] demonstrates that although the investigation that led to the passage of this Act (as well as at least 10 other anti-crime stat-

[5] The 1934 Act was introduced as S. 2248 (73d Cong., 2d Sess.) on January 11, 1934, together with a number of other anti-crime bills. 78 Cong. Rec. 409, 448–460 (1934). It was reported from the Judiciary Committee on March 22, 1934, and passed the Senate on March 29, 1934, without debate. 78 Cong. Rec. 5082, 5734–5735 (1934). On June 13, 1934, the House passed the measure, as amended, without substantial debate. 78 Cong. Rec. 11402–11403 (1934). On the next day the Senate concurred in the House amendment, and on June 18, 1934, it was signed into law. 78 Cong. Rec. 11482, 12451 (1934).

utes) was the outgrowth of congressional concern regarding the activities of gangsters such as Dillinger and so-called "racketeering," the bill proposed and enacted was broadly drafted to protect interstate commerce against all interference resulting from the actual or threatened use of force, violence, and coercion.

The 1934 Act was officially titled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation." Like the Hobbs Act, the 1934 Act was drafted in broad terms to reach, *inter alia*, "[a]ny person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce * * *," obtains or attempts to obtain the property of another by the use of or threat to use "force, violence, or coercion."[6] The word "any"—the broadest available—recurs four

[6] Section 2 of the 1934 Act provided (48 Stat. 979–980):

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

times in the brief paragraph describing the reach of the Act's proscription.

The Senate Judiciary Committee recommended passage of the Act on the ground that the Sherman Antitrust Act was "not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion." S. Rep. No. 532, 73d Cong., 2d Sess. 1 (1934); see also H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934). The Judiciary Committee described the bill's purpose as to (S. Rep. No. 532, *supra*, at 1; emphasis added)

> extend Federal jurisdiction over *all* restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints, if accompanied by extortion, violence, coercion, or intimidation, are made felonies, *whether the restraints are in form of conspiracies or not.*

Although the history of the adoption of the Act shows it to be an outgrowth of investigations directed in large part at various activities described as "racketeering," it offers no support for the view that Congress did not intend the Act to apply to all the activities falling within its express terms, but rather only to some narrower class of activities constituting "racketeering."

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both."

The 1934 Act was proposed by the Copeland Committee, a subcommittee of the Senate Commerce Committee that had been authorized to investigate "the subjects of kidnaping, racketeering, and other forms of crime" (78 Cong. Rec. 448 (1934)) during what the Committee described as a "crime wave of proportions never before known." S. Rep. No. 1189, 75th Cong., 1st Sess. 38 (1937). In 1934 the Committee proposed some 90 bills, including the 1934 Act, all of which it described as aimed at making more difficult "the activities of predatory criminal gangs of the Kelly and Dillinger types." S. Rep. No. 1440, 73d Cong., 2d Sess. 1–2 (1934).

Certainly neither the fact that the Committee had initially been chartered to investigate "racketeering" nor its concern with "predatory criminal gangs" supports the conclusion that all of the legislation that it proposed—including the 1934 Act—was intended to reach only a narrow class of activities constituting "racketeering" rather than the activities actually described in the statutory language. Indeed, the range of the legislation that resulted from the work of the Committee rebuts any such inference.[7]

[7] In addition to the 1934 Act, the Committee's work resulted in the passage of the legislative forerunners of the following present criminal statutes, all now codified in Title 18 of the United States Code: Section 875 (interstate transmission of extortionate communications, etc.); Section 1073 (interstate flight to avoid prosecution or giving testimony); Section 1114 (protection of federal officers in performance of official duty); Section 1201 (federal kidnaping statute); Section 1792 (mutiny or riot in federal penal institution); Section 2113 (federal bank robbery statute); Section 2314 (interstate transportation of stolen property); and Section 2315 (sale or receipt of stolen property with interstate origin). See S. Rep. No. 1440, *supra*, at 1–6. Like the 1934 Act, none of these bills was expressly limited to "racketeering."

Moreover, since the Copeland Committee had found (S. Rep. No. 1189, *supra*, at 2) that "racket" and "racketeering" were terms that "ha[d] for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent, or even disliked, whether criminal or not," it is inconceivable that it would nevertheless attempt to make "racketeering" an element of any criminal offense without defining it. Indeed, for the purposes of its investigation the Committee adopted what it described as a "working definition" of "racketeering" as "an organized conspiracy to commit the crimes of extortion or coercion" (*id.* at 3; emphasis added):

> *Racketeering is an organized conspiracy to commit the crimes of extortion or coercion, or attempts to commit extortion or coercion, within the definition of these crimes found in the penal law of the State of New York and other jurisdictions.* Racketeering, from the standpoint of extortion, is the obtaining of money or property from another with his consent, induced by the wrongful use of force or fear. The fear which constitutes the legally necessary element in extortion is induced by oral or written threats to do an unlawful injury to the property of the threatened person by means of explosives, fire, or otherwise; and to kill, kid-

nap, or injure him or a relative of his or some member of his family.

Racketeering from the standpoint of coercion usually takes the form of compelling, by use of similar threats to person or property, a person to do or abstain from doing an act which such other person had the legal right to do or abstain from doing, such as joining a so-called protective association to protect his right to conduct a business or trade. Coercion as such does not necessarily involve the payment of money, but frequently both extortion and coercion are involved in racketeering.

Although the Committee's working definition appears to have strongly influenced the drafting of the 1934 Act, as the Senate Judiciary Committee noted, the Act omitted any requirement of proof of a conspiracy, a central element of the Copeland Committee's working definition. S. Rep. No. 532, *supra,* at 1.

The references in the House and Senate reports to concern regarding "racketeering" and the federal attempts to suppress "so-called 'racketeering' " likewise demonstrate no intent to impose some unstated restriction on the application of the Act. In fact, neither committee attempted to define "racketeers" or "racketeering," nor do their reports reflect any indication that the bill contained an unstated limitation to only "gangsters," or to some undefined class of "racketeers."

In contrast, the reports specifically noted that because "ordinary business practices" and particularly the "legitimate activities" of employers and employees were not within the purposes of the Act, they

had been excluded (*id.* at 2; H.R. Rep. No. 1833, *supra,* at 2). This exclusion was made explicit in the wording of the Act and was explained in the reports.[8]

2. The 1934 Act was replaced by the Hobbs Act, which was adopted in direct response to the Supreme Court's construction of the 1934 Act as exempting certain strong-arm labor tactics from federal prosecution.[9] See *United States* v. *Enmons,* 410 U.S. 396; *United States* v. *Green,* 350 U.S. 415, 418–419.

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[8] The Senate Report (quoting a memorandum from the Department of Justice) stated: "The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering." S. Rep. No. 532, *supra,* at 2. The House Report quoted a letter from the Attorney General that "the typical racketeering activities affecting interstate commerce," those "in connection with price fixing and economic extortion directed by professional gangsters," were incorporated in Sections 2(a) and (b) of the Act, whereas "legitimate and bona fide activities of employers and employees" were "definitely exclude[d]." H.R. Rep. No. 1833, *supra,* at 2.

Both comments refer to the provision in Section 2(a) of the Act excepting "the payment of wages by a bona-fide employer to a bona-fide employee," and to Section 6 regarding the activities of labor organizations. See pp. 28–30, *infra,* and notes 16 and 17.

[9] In *United States* v. *Local 807,* 315 U.S. 521, this Court construed Section 2(a) of the 1934 Act, which provided exemption for "the payment of wages by a bona-fide employer to a bona-fide employee," as excluding from the coverage of the statute the activities of New York City teamsters who would lie in wait for out-of-town truckers and then coerce payment for the unwanted and superfluous service of driving the trucks within the city, whether or not the service was supplied. The principal objective of the Hobbs Act was "to prevent a recurrence of what happened in the Supreme Court opinion [in *Local 807*]." 91 Cong. Rec. 11919 (1945) (remarks of Congressman LaFollette); see also *id.* at 11847 (remarks of Congressman Lane); 89 Cong. Rec. 3202 (1943) (remarks of Congressman Walter).

As with the 1934 Act, neither committee report on the Hobbs Act contains the slightest suggestion of any intention to limit the broad language employed in the Act. For example, the Senate Committee on the Judiciary stated (S. Rep. No. 1516, 79th Cong., 2d Sess. 1 (1946)):

> The purpose of this bill is to prevent interference with interstate commerce by robbery or extortion, as defined in the bill. Title I of this bill is an amendment of the existing law which was enacted in 1934. The objective of the amendments is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion.
>
> A conspiracy or attempt to do anything in violation of section 2, title I, is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2.[10]

[10] The House Judiciary Committee report described the bill in equally expansive terms (H.R. Rep. No. 238, 79th Cong., 1st Sess. 9 (1945)): "The objective of title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of section 2 is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2."

The report concluded with the observation (*id.* at 10):

"The Congress does not need to be reminded that the Constitution of the United States confers on it the exclusive and unlimites

The debates make it even clearer, if that is possible, that no "racketeering" limitation was intended. Because the Hobbs Act was clearly designed to reverse the construction of the 1934 Act as exempting certain labor tactics, the primary concern discussed during the debates was whether the bill constituted an attack on organized labor.[11] In response, the proponents of the bill stressed that it applied broadly to all acts of robbery and extortion affecting interstate commerce. Congressman Hobbs, whose views as the Act's sponsor are entitled to substantial weight (*United States* v. *Mine Workers*, 330 U.S. 258, 279–280), stated (89 Cong. Rec. 3217 (1943)):[12]

[*sic*] power to regulate interstate commerce. A necessary concomitant of this power is the high duty to protect interstate commerce in the interest of all the people. * * *

* * * * *

"* * * [T]here must be agreement that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its duty of protecting interstate commerce."

[11] See *e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Congressman Lane); 91 Cong. Rec. 11901 (1945) (remarks of Congressman Celler); 89 Cong. Rec. 3201 (1943) (remarks of Congressman Celler); 89 Cong. Rec. 3207 (1943) (remarks of Congressman O'Hara).

[12] References in this brief to statements in Volume 89 of the Congressional Record pertain to the debate on the original bill introduced by Congressman Hobbs (H.R. 653) in the 1st Session of the 78th Congress (1943). This bill passed only the House. The provisions of H.R. 32, 79th Cong., 1st Sess. (1945), which became the Hobbs Act, substantially carried forward the operative language of the original bill. This Court recognized in *United States* v. *Enmons*, *supra*, 410 U.S. at 404–405, n. 14, that the remarks in Con-

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion * * *. It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion.

Many other supporters of the bill echoed this broad view. Congressman Vursell stated simply that "this act seeks to do only one thing—to strengthen the law against robbery and extortion. You can't read anything more into it." 91 Cong. Rec. 11908–11909 (1945). And Congressman Gwynne observed that "[t]his bill simply would protect interstate commerce from robbery and extortion, *no matter by whom these crimes were committed.*" *Id.* at 11904 (emphasis supplied)."[13]

It is true that the debates include many references to "racketeers," particularly in the labor unions, as well as to "labor goons" and "gangsters" (see, *e.g.*, 91 Cong. Rec. 11841, 11906, 11909–11910 (remarks of Congressmen Cox, Robsion, and Sumners)), but nowhere is there any suggestion that the bill would apply

gress with respect to the original bill "are wholly relevant to an understanding" of the statute.

[13] The same point was echoed by a number of other proponents of the legislation. Congressman Springer stated: "We must further remember that this bill applies to every citizen under the American flag, whoever he may be, wherever he may live or to whatever organization he may belong." 91 Cong. Rec. 11911 (1945); see also, 89 Cong. Rec. 3212 (1943). Congressman Hancock likewise stated: [This Act] is directed against robbery and extortion when used to obstruct the free flow of goods in interstate commerce, no matter who the offenders may be." 89 Cong. Rec. 3210 (1943). See also the remarks of Congressman Fellows and Jennings. 89 Cong. Rec. 3206, 3211 (1943).

only to persons who could be classed as goons, gangsters, or racketeers. Nor was "racketeering" proposed as an element of the Hobbs Act; to the contrary, when Congressman Gwynne enumerated "what a prosecutor would need to allege and prove to get [a] conviction,"[14] he made no mention of racketeering.

Indeed, the comments of Congressman Hobbs underscore the fact that, in view of the Supreme Court's construction of the 1934 Act, special care had been taken to state Congress's intent explicitly (91 Cong. Rec. 11912 (1945)):

> We wiped the whole [Copeland Act] out and substituted a bill that cannot be misunderstood. * * * [I]t is so clearly expressed that it will do the job it is meant to do, which is to prevent interference with interstate commerce by robbery or extortion. That is all we are shooting at. Those words have been construed a thousand times by the courts. Everybody knows what they mean.
>
> * * * * *
>
> * * * [C]rime is crime, no matter who commits it. Robbery is robbery and extortion is extortion, whether or not the perpetrator has a union card in his pocket.

[14] Congressman Gwynne stated (91 Cong. Rec. 11903 (1945)): "First, they would need to prove that the activity complained of in some way affected interstate commerce; second, they would have to prove that there was an actual, not a theoretical, taking of personal property; third, they would have to prove that the taking was by violence, by personal violence, or by actual threats of personal violence; and then, fourth, they would have to prove that the acts done—they might be violent, they might take something, but the Government would have to prove in addition that the acts done did not come within the exceptions set out in title III."

The debates on the Hobbs Act also focused on the fact that the crimes of robbery and extortion established by the Hobbs Act were already punishable under state law; indeed, the definitions of robbery and extortion were derived from the New York criminal code. See 91 Cong. Rec. 11843, 11900 (1945) (remarks of Congressmen Michener and Hancock). Opponents of the bill pointed out that each state had criminal laws that should be adequate to deal with robbery and extortion, and that convictions should be easier to obtain under state law, since no effect on commerce need be shown. 91 Cong. Rec. 11903, 11913 (1945) (remarks of Congressmen Welch and Resa). Opponents objected that the "purpose [of the bill] is to have the Federal Government assume the policing power that belongs to the respective States"; they urged that "this is not a Federal Government function," but rather "another instance of objectionable duplication by the Federal Government of the functions and activities of the States." 91 Cong. Rec. 11922, 11903, 11913 (1945) (remarks of Congressmen Lemke, Welch, Resa).

The proponents of the bill repeatedly acknowledged that there were applicable state laws but urged the adoption of the bill because local enforcement had not been adequate to protect interstate commerce. For example, Congressman Michener stated that there were state laws which could be "adequate," but were not enforced by local officers; he concluded (91 Cong. Rec. 11843 (1945)):

> Every State in the Union * * * should enforce its laws. However, if interstate commerce is being interfered with, * * * then it seems clear that it is the obligation of the Congress to furnish national protection in these interstate operations.

In response to the question whether there were any states without laws dealing with the conduct covered by the Hobbs Act, Congressman Sumners, the Chairman of the Judiciary Committee, answered that the states had such laws, but some states did not "do their duty" to enforce these laws. He responded directly to the states' rights argument as follows (91 Cong. Rec. 11910 (1945)):

> I am not opposed to States' rights, but I am not willing to go so far in supporting States' rights that gangsters of one State may rob citizens of another State engaged in interstate commerce. Do States' rights include that? * * *
>
> * * * * *
>
> It is a poor time to stand up for States' rights on the side of a bunch of gangsters like this.

See also 89 Cong. Rec. 3217–3218 (1943) (remarks of Congressman Hobbs). In the face of this history, it is not sustainable to depart from normal principles of statutory construction in order to avoid what some individual judges may think to be undue overlap between the Hobbs Act and state criminal enforcement activities.

3. The legislative history thus provides no support for the narrow reading given to the Act by the Sixth Circuit in *United States* v. *Yokley,* 542 F. 2d 300, and followed without further analysis by the majority of

the court of appeals in this case. The *Yokley* court relied upon the fact that the Copeland Committee, which proposed the 1934 Act, was charged with investigating "rackets" and had stated that the bills it proposed would render more difficult the activity of "predatory criminal gangs" of the "Dillinger type." However, as noted above, the Copeland Committee proposed bills on subjects ranging from kidnaping and mutiny in a federal penal institution to interstate transportation of stolen property and interstate flight to avoid prosecution or giving testimony (see note 7, *supra*). None of these bills contained any explicit limitation to "racketeering," and until *Yokley* none had been interpreted as nevertheless requiring a showing of "racketeering." The *Yokley* court also found the emphasis in the debates on the Hobbs Act regarding the need to eliminate "racketeering" persuasive. 542 F. 2d at 303. However, the debates clearly established that, despite Congress' concern with "racketeers," "gangsters" and "labor goons," the bill was intended to apply equally to any person guilty of robbery or extortion affecting interstate commerce.

Finally, the *Yokley* court stated that the Senate Judiciary Committee report [15] had recommended passage of the 1934 Act "as a means for 'prosecution of racketeers' " and that "the report indicated that practices 'not accompanied by manifestations of racketeering' were outside the scope of the Act." 542 F. 2d at 303.

[15] Although the court cited "S. Rep. No. 1833," the quoted language is taken from S. Rep. No. 532, *supra*.

The Committee indeed viewed acts of extortion, violence, coercion, and intimidation such as those of respondent as "manifestations of racketeering," and it responded by making the "manifestations" federal offenses when they affected interstate commerce. But its prohibition extended to "whoever" engaged in acts constituting such "manifestations"; there is not one iota of support for the notion that the 1934 Act—and, by inheritance, the Hobbs Act—exempted persons who committed acts constituting "manifestations of racketeering" if they were not also shown to have done them in the capacity of "racketeers."

Moreover, we think the *Yokley* court misread the "manifestations of racketeering" language by considering it out of its context.[16] The language appeared in a portion of the report dealing with certain "bona fide" activities of labor unions and businesses that

[16] The Senate report described the inadequacy of the Sherman Act to deal with cases involving violence, intimidation and extortion, and stated (S. Rep. No. 532, *supra*, at 1): "The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act 'affecting' or 'burdening' such trade or commerce if accompanied by extortion, violence, coercion, or intimidation."

The portion of the report quoted in part by the *Yokley* court then states (*id.* at 2): "The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering."

were expressly excepted from the reach of the statute.[17] Thus, it was intended to illuminate a specific and narrow area that the Act would not reach rather than to reflect an additional element of the offense not alluded to in the language of the statute itself. In any event, the principal purpose of the Hobbs Act was to eliminate the exception that the 1934 Act had contained; accordingly, the Hobbs Act cannot fairly be construed by reference to the explanation given in 1934 for a provision Congress excised in 1946.

The *Yokley* court also grounded its decision on *United States* v. *Enmons,* 410 U.S. 396, which the Sixth Circuit construed as holding that "alleged illegal activity which was within the literal language of the statute was not within the Congressional intent" (542 F. 2d at 303). However, this Court specifically found that the conduct at issue in *Enmons* (the use of violence to achieve legitimate union objectives, such as higher wages for genuine services the employer sought) was not within the language of the Act. 410 U.S. at 399–400 and n. 3.[18]

[17] Section 2(a) of the Act (48 Stat. 980) exempts "the payment of wages by a bona-fide employer to a bona-fide employee" from the prohibition on the use or threat to use force, violence, or coercion to obtain the payment of money. Section 6 (48 Stat. 980) provided that the Act was not to be construed to affect "the rights of bona-fide labor organizations in lawfully carrying out [their] legitimate objects." The version of S. 2248 initially introduced (78 Cong. Rec. 457–458 (1934)) employed slightly different language; Section 2(3) prohibited, *inter alia,* coercion or attempted coercion of any person to make any payments "to any person, association, firm, corporation, or group, except for a bona-fide consideration."

[18] Extortion under the Hobbs Act requires, in substance, that property be obtained from another, with his consent, through the "wrongful" use of force or threats, or under color of official right.

In *Enmons,* since the conduct alleged did not fall within the language of the Act, and the legislative history contained conflicting statements, the Court applied the principles of lenity in construing criminal statutes and caution where the federal-state balance is implicated. But as this Court reemphasized most recently in *Scarborough* v. *United States,* No. 75–1344, decided June 6, 1977, slip op. 14, these principles are applicable only in cases where, even after a review of the legislative history, the statute remains ambiguous. Here, as we have shown above, extortionate conduct affecting commerce clearly falls within the broad language of the Act, and the legislative history is entirely consistent with this language. *Enmons* thus provides no support for the view, never taken before *Yokley* and essential to its holding, that conduct clearly covered by the Act is nonetheless immune from its proscriptions.

D. CONCERN FOR THE FEDERAL-STATE BALANCE DOES NOT JUSTIFY THE ADDITION OF THE ELEMENT OF RACKETEERING, WHICH MAY RENDER THE ACT VOID FOR VAGUENESS

The court of appeals also concluded that, "apart from the legislative history" of the Hobbs Act, an interpretation of the Act limiting it to conduct constituting "racketeering" was necessary to prevent "federal usurpation of virtually the entire criminal

18 U.S.C. 1951(b)(2). The *Enmons* Court construed the term "wrongful" to refer to the ends sought by the extortionist, not the means used, and went on to hold the use of force by union members to achieve legitimate collective bargaining demands was not "wrongful" within the meaning of the statute.

jurisdiction of the states" (Pet. App. 3a–4a). The court did not suggest that Congress lacked the constitutional authority to prohibit the conduct proscribed by the Act, but instead held that "[c]onsiderations of federalism" militated against a conclusion that Congress had "intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty" (*ibid*).

As our discussion of the debates preceding adoption of the Hobbs Act demonstrates (see pp. 25–27, (*supra*), Congress was well aware of the fact that the conduct it was making criminal was already punishable under state law. Opponents of the bill argued against it on the ground that it intruded into matters of local concern and invaded the rights of the states; the proponents of the bill agreed that the Act reached conduct also regulated by the states but contended that the passage of the Act was necessary to protect interstate commerce. The passage of the bill over these objections therefore indicates, as this Court stated in *Stirone, supra*, 361 U.S. at 215, that Congress intended to legislate as broadly as permitted by its power over interstate commerce.

This case is thus a far cry from one such as *Rewis* v. *United States,* 401 U.S. 808, 810, where this Court found that the absence of any discussion of the federal-state balance in the legislative history strongly suggested that Congress had not intended the Travel Act, 18 U.S.C. 1952, to transform relatively minor

state offenses into federal felonies. Although this Court has stated that it is reluctant to "assume" in construing an ambiguous statute that Congress has effected a significant change in the relation between federal and state criminal jurisdiction, *Bass* v. *United States,* 404 U.S. 336, 349, in this case no assumption is required, since the text of the Hobbs Act is unambiguous and the legislative history is fully consistent with the plain meaning of the text. Cf. *Scarborough* v. *United States, supra.* Accordingly, considerations of federal-state relations provide no justification for judicial restructuring of the Act to import the concept of "racketeering."

Moreover, this case surely does not represent "an extraordinary and unprecedented encroachment into the realm of state sovereignty" (Pet. App. 4a). The federal government has a compelling interest in prosecuting under its own laws an attempted extortion from a bank that it insures, that serves businesses in many states, and that is part of an industry that, perhaps more than any other, facilitates the flow of interstate commerce.[19] As Judge Carter

[19] The United States Attorney conceded, and the court below held, that respondent's attempted taking of bank assets by means of threats or violence did not come within 18 U.S.C. 2113 because, having directed that the money be left in a parking lot, he did not attempt to take the assets "from the person or presence of another." Although the United States Attorney's concession was not approved by the Solicitor General and does not represent the position of the Department of Justice on this question, Judge Carter correctly observed that the decision below, if undisturbed, might result in an ominous gap in the protection afforded the banking industry (Pet. App. 10a):

pointed out in his dissent, that interest is certainly no less significant than those safeguarded by a legion of federal criminal statutes whose enactment under the commerce power has not been thought to threaten undue interference with the criminal jurisdiction of the states.[20] Indeed, as the dissent also noted, Congress has shown special concern for protection of the banking industry by its enactment of the federal bank robbery statute, 18 U.S.C. 2113.

The fact that the Hobbs Act creates broad federal jurisdiction does not, of course, in any way disable the states from enforcing their own laws against extortion and robbery. No one has ever suggested that the Act preempts state law enforcement powers. Nor is there any evidence that the enforcement of the Act has actually impinged on the states' law enforcement prerogatives or resulted in a wholesale invasion of state sovereignty. Indeed, it is the policy of the Department of Justice to administer the Hobbs Act with a careful awareness of the appropriate bound-

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A successful extortionist, if not subject to prosecution under the Hobbs Act, could only be convicted of bank larceny under 18 U.S.C. § 2113(b), with the threats of violence going unpunished. * * * And one who unsuccessfully attempts extortion against bank property, as here, could not be prosecuted at all under any federal statute. I cannot believe Congress intended to have this glaring hole in our criminal law.

At least one court of appeals has reached a contrary conclusion regarding the scope of Section 2113. *Brinkley* v. *United States*, 560 F. 2d 871 (C.A. 8), certiorari denied, No. 77-5323, November 7, 1977.

[20] A list of these statutes is set forth in the dissenting opinion (Pet. App. 6a–7a, n. 1).

aries between the areas of respective state and federal interests.[21]

In any event, requiring proof of "racketeering" would not serve the purpose of screening out cases in which no substantial federal interest was present. Although the court of appeals did not define "racketeering," there is nothing inherent in the concept that suggests that "racketeers" would prey only upon individuals or businesses heavily involved in interstate activities or that the concept would otherwise meaningfully restrict Hobbs Act prosecutions to crimes in which the federal government may be thought to have a substantial rather than a slight interest. Indeed, the reversal of the conviction in the present case—in the

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[21] Guidance regarding Hobbs Act prosecutions is provided by the *United States Attorneys' Manual* (176). Title 9, Section 2.,133, as amended May 5, 1977, provides that the United States Attorney should consult the Criminal Division prior to instituting certain classes of Hobbs Act cases. Section 131.030, as amended May 5, 1977, provides, however, that with certain exceptions prior authorization is not necessary when there is evidence of actual or threatened force or violance.

The *Manual* also sets policy limitations for Hobbs Act prosecutions in robbery cases (Title 9, Section 131.110): "* * * As a matter of policy, the Department has restricted use of the robbery provisions of the Hobbs Act to cases which involve organized criminal activity or which are part of some wide-ranging scheme. The Government Regulations and Labor Section must be consulted before any action is taken in robbery cases under section 1951."

As the court correctly recognized in *United States* v. *Brecht*, 540 F. 2d 45, 52, n. 14 (C.A. 2), the desirability of bringing a particular prosecution under the Hobbs Act is a matter within the discretion of the Department of Justice, not the courts. Cf. *United States* v. *LeFœivre*, 507 F. 2d 1288, 1296 (C.A. 4); *United States* v. *Archer*, 486 F. 2d 670, 678 (C.A. 2).

face of the strong federal concern with the banking industry arising from its vital effect on interstate commerce—demonstrates that the requirement of proof of racketeering has little or nothing to do with concern for state sovereignity.

Moreover, neither the court in this case nor the *Yokley* court provided any definition of "racketeering." As the Copeland Committee itself recognized, the term is loosely used to refer to "every conceivable sort of practice or activity which [is] either questionable, unmoral, fraudulent, or even disliked, whether criminal or not." S. Rep. No. 1189, *supra,* at 2. And, although the working definition of "racketeering" adopted by the Committee for its own purposes clearly influenced the drafting of the 1934 Act, and subsequently the Hobbs Act, as noted above the Hobbs Act does not incorporate that definition, since it omits the element of conspiracy. See pp. 19–20, *supra.*

A more recent but related law, the Anti-Racketeering Statute, 18 U.S.C. 1961 *et seq.,* does contain a detailed definition of the term "racketeering activity," as any act or threat involving certain enumerated state felonies, including extortion, and any act which is indictable under a number of specified federal statutes, including the Hobbs Act. 18 U.S.C. 1961(1). It seems evident, however, that the court of appeals did not intend to incorporate that statutory standard, since respondent's conduct clearly constitutes a "racketeering activity" under that definition.

Indeed, although the Sixth Circuit in *United States* v. *Harding,* No. 77–5030, decided September 29, 1977,

stated that "[t]he concept of racketeering * * * has long been understood to include the obtaining of property under color of official right" (slip op. 13), at least one district court applying the court of appeals' decision in the instant case seems to have reached a contrary conclusion. In *United States* v. *Curran,* N.D. Cal., No. 77–186–RHS, decided May 18, 1977, appeal pending, C.A. 9, No. 77–2353, an indictment charging ten policemen with conspiracy to extort money by use of their official positions was dismissed by the district court for failure to allege facts constituting "racketeering."

The vagueness of the "racketeering" concept not only makes prosecution under the statute exceedingly difficult, but it could also render the Hobbs Act unconstitutionally vague. In *Lanzetta* v. *New Jersey,* 306 U.S. 451, the Court held a state statute making it a criminal offense to be a member of a "gang" void for vagueness because it failed to define "gang," a term with no meaning derivable from the common law, and a variety of meanings in historical and sociological writings. Similarly, in *United States* v. *Fabrizio,* 385 U.S. 263, this Court rejected the claim that a statute which by its terms reached "whoever" transported gambling paraphernalia in interstate commerce (18 U.S.C. 1953) was nevertheless restricted to persons connected with organized crime or participating in an illegal gambling or lottery enterprise, observing that a "statute limited without a clear definition of the covered group * * * might raise serious constitutional problems" (385 U.S. at 267). See also

United States v. *Campanale,* 518 F. 2d 352, 364 (C.A. 9), certiorari denied *sub nom. Matthews* v. *United States,* 423 U.S. 1050 ("if undefined, terms such as 'pattern of racketeering activity' would be unmanageable").

In short, the holding of the court below is not only at odds with the statutory language, the legislative history, and precedent, but it imposes a restriction on the use of the Hobbs Act which, as a practical matter, might well render the statute unenforceable.

Conclusion

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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November 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-142

UNITED STATES OF AMERICA,

Petitioners,

v.

DONALD LAVERN CULBERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Respondent accepts the statement of the case set forth in the government's brief as substantially correct.

SUMMARY OF ARGUMENT

1. Notwithstanding this Court's dictum in *Stirone v. United States*, 361 U.S. 212, 215, that the Hobbs Act contains broad language manifesting a congressional

intent to exercise the full extent of power, this Court later held that being a criminal statute, the act must be strictly construed. *United States v. Enmons*, 410 U.S. 396 (1973).

2. When a broad interpretation of the statute results in an unwarranted incursion into the police power of the State, the intent and purpose of Congress to effect such an intrusion must be clear.

3. The legislative history of the Hobbs Act, 60 Stat. 420, codified at 62 Stat. 793, 18 U.S.C. §1951, and its predecessor statute, the Federal Anti-Racketeering Act of 1934 (Copeland Act), 48 Stat. 979, supports the conclusion that the legislation was aimed at racketeering which directly affected interstate commerce. The original bill was part of a 1934 package of anti-crime legislation to curb the crisis brought about by gangster and racketeering activities. Through the judicial expansion of the scope of the commerce clause, the statute appears to apply to any extortion or robbery of any victim having a *de minimus* contact with interstate commerce. Such a broad application of the statute is not in accord with the congressional intent, and results in an unwarranted intrusion into the sovereignty of the states.

I.

THE SCOPE OF THE HOBBS ACT MUST BE LIMITED TO PRESERVE THE STATE-FEDERAL BALANCE.

This case involves another instance where the government seeks an overbroad application of a federal

statute resulting in the usurpation of primary state jurisdiction. While perhaps lamentable, the Bank Robbery Act (48 Stat. 783, 50 Stat. 749), 18 U.S.C. §2113, does not specifically cover extortionate transactions involving national banks. See the legislative history in *Jerome v. United States*, 130 F.2d 514 (2d Cir. 1942), affirmed, 318 U.S. 101 (1943); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967). Extortionate conduct is comprehensively proscribed in California. Calif. Penal Code, §§518, 519.

Because the effect on commerce under the Hobbs Act need only be *de minimis*, the potential exists for virtually unlimited federal interference in state and local law enforcement. The need to restrict such federal interference was the underlying rationale for the decision below, by establishing a balance between legitimate federal and state interests by requiring a showing of "racketeering" in order to sustain a Hobbs Act conviction. The Court stated:

> "Given the applicable *de minimis* burden on interstate commerce rule [citation omitted] a contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history also emphasized in *Yokley*, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty." (*United States v. Culbert*, 548 F.2d 1355, 1357 (9th Cir. 1977)), Pet. App. 3a.

United States. v. Yokley, 542 F.2d 300 (6th Cir. 1976) held that ". . . . although an activity may be within the literal language of the Hobbs Act, it must

constitute 'racketeering' to be within the perimeters of the Act." 542 F.2d at 304. That court required "explicit statutory language" in order to sustain "a federal incursion into the criminal jurisdiction of the states." *Id.* In so doing, the court relied upon this Court's decision in *United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), which said:

> "... [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the states [citations omitted].
>
> "As we said last Term:
>
> " '[U]less Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States .... [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336.
>
> 410 U.S. at p. 411-412.

The government, relying upon this Court's dictum in *Stirone v. United States*, 361 U.S. 212 (1960), Brief of the United States, p. 11, asserts that Congress intended "to use all the constitutional power [it] has to punish interference with interstate commerce by extortion,

robbery or physical violence," and that Congress' use of the term "whoever" reflected this intent. It is apparent that Congress did indeed wish to bring all the forces of the federal government to bear on punishing interferences with interstate commerce, as that term was understood in 1934 and 1946. It is also clear that the target of the legislation was "racketeering," whether or not connected with the labor movement. To adopt the interpretation urged by the government that the Hobbs Act covers *all* activity, without restriction, that has *any affect* on "commerce," as that term is now known, is to afford a coverage so substantial that the federal government will find itself policing local criminal activity with a *de minimus* effect on interstate commerce. The Court of Appeals held that considerations of federalism mandate some restriction on such broad language to prevent an allout intrusion into state police matters. As this Court stated in *United States v. Bass*, 404 U.S. 336 at p. 350:

> In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources.

The government characterizes the Hobbs Act as "unambiguous legislation," since it uses the word "whoever," and fails to specifically use the term "racketeering." While the *Stirone* dictum has been repeatedly cited to support the broad interpretation urged by the government, this Court held more recently that the Hobbs Act, "being a criminal statute, [it] must be strictly construed...." *United States v. Enmons*, 410 U.S. 396 at p. 411 (1973). Almost every court

called upon to interpret the Hobbs Act and its predecessor, the Copeland Act,[1] has resorted to the legislative history to ascertain the true scope of the statute.

As the decision below held, when the plain language of the statute is so broad that its application runs afou of reserved states rights, the courts must impose limitations to effect the true legislative purpose.

II.

THE LEGISLATIVE HISTORY OF THE HOBBS ACT COMPELS THE REQUIREMENT OF "RACKETEERING".

The legislative history of the Hobbs Act is considered at length in *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976) and by this Court in *United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). These cases demonstrate that the act was in response to this Court's decision in *United States v. Local 807*, 315 U.S. 521, 62 S.Ct. 642, 86 L.Ed. 1004 (1941) which had applied then Section 2(a) of the Anti-Racketeering Act of 1934 to exclude extortion of payments from interstate truckers by striking members of a labor union.

The focus of the Congressional debate over the Hobbs Act was a concern that it was punitive legislation directed solely at organized labor. Seizing upon the proponents' expressions of reassurance to labor interests

[1] The Anti-Racketeering Act of 1934, 48 Stat. 979.

that the bill was applicable to *anyone*, the government seeks to support its contention that Congressional intent in the enactment of the Hobbs Act was to reach even isolated instances of robbery and extortion which has even the slightest effect upon commerce.

This reliance is clearly misplaced. The statements the government cites were made merely to allay the fears of labor supporters that the bill was aimed solely at them. Such discussion came up, not in the context of racketeers/non-racketeers but, in fact, labor/non-labor.

The intensity of the sentiment against the bill is evidenced by the remarks of Congressman Sadowski:

> "The most highly publicized antilabor bill now before Congress is the Hobbs bill. The sponsors of this bill call it an Antiracketeering Act. We all agree that racketeering should be ended and that the punishment for racketeering should be severe. However, there is already an antiracketeering statute in Federal law which is called the Antiracketeering Act of 1934.
>
> The trouble with the Hobbs bill is that it can be construed by the courts to prohibit and punish most of the legitimate activities of organized labor . . . .
>
> The Hobbs bill is a bad bill. It is a vicious bill. If passed, it would pave the way for the destruction of organized American labor. Let us not fool ourselves. Success of bills like the Hobbs measure will pave the way for fascism in America in exactly the same way Hitler fastened the bloody tentacles of fascism upon the unhappy people of Europe." (89 Cong. Rec. 3207-08 (1943))

Proponents of the bill continually emphasized that the legislation was not aimed solely at labor. Congressman Hobbs remarked:

> "The first point I want to make briefly is that this is not an anti-labor bill, no matter who says it is . . . If any man, woman or child in the world will show me how any law-abiding member of organized labor can be affected by this bill, I will either offer an amendment correcting that threat, or I will vote against my own bill." (89 Cong. Rec. 3213 (1943)).

Similar reassurance was offered by Congressman Whittington:

> "It is maintained that the Hobbs bill is an attack on organized labor. There is no ground for such contention." (89 Cong. Rec. 3221 (1943)).

Regardless of Congressional concern with the claimed anti-labor aspects of the Hobbs Act, the same debate makes clear the intent to carry through the principal purpose of the 1934 legislation which was ". . . . designed to close gaps in existing federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." *S. Rep. No.* 1440, 73rd Cong., 2d Sess. (1934). The objective of the Hobbs Act was the elimination of "racketeering" in relation to interstate commerce. *H. Rep. No.* 238, 79th Cong., 1st Sess. (1945); *H. Rep. No.* 66, 78th Cong., 1st Sess. (1943). The original House Report on the Hobbs Act stated:

> "This title is an amendment of the existing antiracketeering law which was passed in an effort to eliminate racketeering in relation to interstate commerce, of concern to the Nation as a whole." *H. Rep. No.* 66, 78th Cong., 1st Sess. (1943)

Other Congressional remarks confirm that the Hobbs Act was aimed at "racketeers" whether or not they were members of organized labor.

Congressman Whittington:

> "*The purpose of the bill is to prevent a repetition of the criminal terroristic activities of racketeers,* whether they are members of unions or not. (89 Cong. Rec. 3222 (1943)) (Emphasis Added)

Congressman Anderson:

> ". . . I hope that this bill will pass. *It is aimed at racketeers,* not honest laboring men of unions." (91 Cong. Rec. 11910 (1945)), (Emphasis Added)

Thus, the limited purpose of the Hobbs Anti-Racketeering Act was to *amend* the Antiracketeering Act of 1934 (Act of June 18, 1934, Ch. 566, §1-6, 48 Stat. 979) without affecting the scope of the 1934 Act. *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976).

The Court of Appeals for the Sixth Circuit stated in *Yokley, supra,* that:

> Since the Congressional intent in enacting the Hobbs Anti-Racketeering Act, as an amendment to the Anti-Racketeering Act of 1934, was "nothing more than . . . undoing the restrictive impact of [the Local 807] case", *Enmons, supra,* 410 U.S. at 408, 93 S.Ct. at 1014, it is necessary to examine the legislative history of the Act of 1934 to determine the scope of its successor, the Hobbs Act. Pursuant to a Senate Resolution of May 8, 1933, a subcommittee of the Senate Committee on Interstate Commerce, the Copeland Committee, undertook an investigation of "rackets" and "racketeering" in the United States. S. Res. 74, 73d Cong., 1st Sess. (1933). After several hearings, the Committee initiated 13 bills, of which S. 2248 was one. S. 2248 was reported favorably by the Senate Judiciary Committee as a means for "prosecution of racketeers," but the report indicated that practices "not accompanied by

manifestations of racketeering" were outside the scope of the Act. S. Rep. No. 1833, 73d Cong., 2d Sess. (1934) [Should be S. Rep. 532] After S. 2248 passed both the House and Senate without debate, Senator Copeland submitted a report in which he referred to the bill as a means "to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." S. Rep. No. 1440, 73d Cong., 2d Sess. (1934).

[3, 4] Moreover, the concern of Congress in amending the Act of 1934 by the enactment of the Hobbs Act was the elimination of "racketeering" in the United States. See, e.g., 89 Cong. Rec. 3205 (1945) (remarks of Congressman Celler); 89 Cong. Rec. 3207 (1945) (remarks of Congressman O'Hara); 91 Cong. Rec. 11844, 11905 (1945) (remarks of Congressman Robsion); 91 Cong. Rec. 11906 (1945) (remarks of Congressman Celler). Accordingly, although an activity may be within the literal language of the Hobbs Act, it must constitute "racketeering" to be within the perimeters of the Act.

542 F.2d at p. 303-304.

Senate Report No. 1189, (75th Congress, 1st Sess. (1937)) is illuminating in that it reflects a focus by Congress on the mid-thirties "crime wave" in general, and "racketeering" in particular. The report reads in pertinent part, that:

> Senate Resolution 74 of the Seventy-third Congress, adopted June 12, 1933, directed the Committee on Commerce, or any duly authorized subcommittee thereof, to investigate rackets and racketeering in the United States, and to report to the Senate the results of such investigation, together with recommendations for the enactment

> of legislation designed to check the spread of racketeering. (Report, p. 1)
>
> * * *
>
> Since crime, of which racketeering is one phase, has traditionally been regarded as essentially a local matter – that is, a matter within the exclusive jurisdiction of the States and their subdivisions – no investigation of a similar nature had ever before been undertaken, so far as we know, by any committee of the United States Senate. (Report pp. 1-2)
>
> * * *
>
> The public generally seemed to be unaware of, or at least not alive to, the jurisdictional boundaries in this field created by the constitutional limitations on the power of Congress.
>
> Additional confusion resulted from the fact that the words "racket" and "racketeering" have for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent or even disliked, whether criminal or not. Indeed, the very resolution which directed the investigation, did not help very much in defining and delimiting the scope of the work; nor was it desirable from the investigative aspect, that the scope of the inquiry should be too definitely fixed.
>
> There were, however, certain fundamental and obvious limitations upon the activities of the committee. First, *it was clear that the committee was not intended as a superpolice, nor as a prosecuting or judicial body for the supervision and investigation of the activities of local authorities.* On the contrary, the subcommittee was organized to consider ways and means by which the Federal Government might *aid in the suppression of rackets and racketeering, and, therefore, its*

activity would have to be limited for the most part to matters falling within the categories of interstate commerce and use of the mails. (Report, p. 2) [Emphasis Supplied]

* * *

At the outset of its work, the subcommittee adopted a working definition of the terms "racket" and "racketeering." In seeking such a definition, it consulted many legal authorities, as well as others who were studying the problem. . . . This definition is:

> *Racketeering is an organized conspiracy to commit the crimes of extortion or coercion,* or attempts to commit extortion or coercion, within the definition of these crimes found in the penal law of the State of New York and other jurisdictions. Racketeering, from the standpoint of extortion, is the obtaining of money or property from another with his consent, induced by the wrongful use of force or fear. The fear which constitutes the legally necessary element in extortion is induced by oral or written threats to do an unlawful injury to the property of the threatened person by means of explosives, fire, or otherwise; and to kill, kidnap, or injure him or a relative of his or some member of his family.
>
> Racketeering from the standpoint of coercion usually takes the form of compelling, by use of similar threats to person or property, a person to do or abstain from doing an act which such other person had the legal right to do or abstain from doing, such as joining a so-called protective association to protect his right to conduct a business or trade. Coercion as such does not necessarily involve the payment of money, but frequently both extortion and coercion are involved in racketeering.

This was used by the committee throughout the investigation, *and may be regarded as the official definition of the term "racketeering."* (Report, p. 2-3) [Emphasis supplied]

* * *

. . . The first New York hearing was held on August 14 and 15, 1933, and was devoted to testimony dealing with racketeering in general, as will (sic) as the laws then in existence for coping with racketeering and proposals for new legislation. (Report, p. 4)

* * *

. . . They also indicated the possibilities afforded to the unscrupulous for building *large and powerful underworld organizations – one of the characteristics of rackets not usually found in other forms of criminal activity.*

RACKETEERING

While racketeering is not something new, there has been a great development and increase of the criminal activities so termed during the past 15 years. As a result, the crime problem has become national in scope, since, *while we are not able to demonstrate that even a single racket has been organized on a national basis a large part of the activities of racketeers extends across state lines.* By this is not meant that the jurisdiction over rackets is Federal rather than local. *Jurisdictionally speaking, rackets are predominantly matters of local concern.* The national aspect arises, however, since the problem cannot be met unless all of the States and other local units throughout the country do their full part. Federal legislation has helped and can help. Rackets may be scotched by prosecution under the commerce or mail powers, when the requisite jurisdictional facts, such as use of the mails or crossing a State line, happen to be

present. *But under our present governmantal set-up the problem must be met in the first instance by strengthening State laws and by increasing the efficiency and vigilance of local police and prosecuting officers.* (Report, p. 10) [Emphasis supplied]

* * *

EXTORTION–COERCION

Although of all the types of crime investigated, kidnapping had attracted the most public attention, it was by no means the most widespread form of racketeering. The type of racket which affects industries, particularly in the large cities, and the different types of rackets perpetrated in the field of transportation, are the most common. *The definition of racketeering adopted by the committee states, as already noted, that racketeering is an organized conspiracy to commit crime through extortion, coercion, intimidation, or violence.* While these efforts are usually against individuals, yet trade and commerce suffer from the same evil. The prevalence and nature of this type of racketeering are too familiar to require further discussion. (Report p. 23-24) [Emphasis Supplied]

It is interesting to note that the Copeland Committee, in Part III of S.Rep. 1189, in summarizing the anti-crime legislation enacted and pending, labeled only *one* act as the "Racketeering Bill," Public Law No. 376 (S.2247-2248 Consolidated) "an Act to Protect Trade and Commerce against Interference by Violence, Threats, Coercion or Intimidation."

Thus, the only statute out of 16 bills passed and 26 pending which the Copeland Committee entitled the

"Racketeering Bill," was the predecessor of the Hobbs Act.[2]

It is obvious that the Copeland Committee, by adopting a working definition which "may be regarded as the official definition of the term 'racketeering,'" intended to give some clear meaning to the use of that term which had "for some time been used loosely to designate every conceivable, sort of practice or activity which was either questionable, unmoral (sic), fraudulent, or even disliked, whether criminal or not." S.Rep. No. 1189, 75th Congress, 1st Session (1937), p. 2-3, Brief of United States, p. 19.

The government concedes that the definition "strongly influenced the drafting of the 1934 Act," but relies upon the failure of the Act to require proof of a

[2]Bills enacted: Bank Robbery, Division of Investigation, Extortion, Firearms, Fugitive from Justice, Fugitive Witness, Kick-Back, Kidnapping, Killing or Assaulting Federal Officers, Amendment to National Motor Vehicle Theft Act, Interstate Pacts, Poultry Racket, *Racketeering Bill*, Rewards for Apprehension of Certain Criminals, Operations of Statute of Limitations, Criminal Conspiracy in Federal Penal and Correctional Institutions.

Legislation pending: Firearms, Alibi Defense, Aliens–Deportation of, Bail–Failure to Appear, Bail–Sources of, Bail, Bank Robbery Act Amendment, Behavior Records, Checks (Interstate), Consolidation of Investigative Agencies, Counterfeiting Dies, Tools, etc., Criminal Code Repeal, Depositions, Extradition, Federal Police, Fingerprinting, Frauds (Interstate), Fugitive Witness Act Amendment, Gambling Devices, Habeas Corpus, Killing or Assaulting Federal Officers, Motor Vehicle Theft Act Amendment, Waiver of Prosecution, Witnesses – Defendants Competent Witness, Witness–Husband and wife, Amendment to §389 of U.S. Code (liquor).

conspiracy as an element of the substantive offense. Brief of the United States, p. 20.

The omission of conspiracy as an element of the offense is consistent with the interpretation of the Court of Appeals, that "racketeering" implies an ongoing organized criminal enterprise, rather than an isolated act not involving any facet of "racketeering," as that term was used by the Copeland Committee. Section 2(d) of the Act provided that: [Any person who] conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall . . ." be guilty of an offense.[3]

It is not unreasonable to attribute to Congress a desire to punish any *individual* who violates the Act, without proof of a conspiracy to obstruct interstate commerce, so long as the individual is engaged in "racketeering." The fact that Congress did not require membership in a criminal conspiracy as an element of the substantive offense does not support the conclusion urged by the government that the omission of such a requirement negates a desire to reach racketeering, which by definition may have the attributes of an "organized conspiracy."

As Sen Rept. 532 (73rd Cong. 2nd Sess. (1934)) pointed out, prosecution of racketeers under the Sherman Anti-Trust Act was impractical, since "it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a *conspiracy*

[3]Changes in phraseology in the Criminal Code Revision deleted the "acts concertedly with any other person" language, as covered by the general "aiding and abetting" section. Act of June 25, 1948, 62 Stat. 793 (1948).

in restraint of such commerce, or a monopoly." (Emphasis supplied) It is consistent with the legislative intent that *acts* which are the product of a racketeering activity be punished, without the additional proof that the acts were part of an overall conspiracy. A conspiracy to engage in racketeering activity is punishable as such under the Act, by proof of an agreement. Congress intended to punish both the agreement and the act, if both constitute "racketeering."

Contrary to the government's assertion (Brief of the United States, p. 18), it is not the respondent's position (nor indeed, the holding of the Court of Appeals) that all of the 1934-1937 legislation proposed by the Copeland Committee was aimed at "racketeering" alone. It is clear from the legislative history, however, that Congress was sensitive to the local nature of many crimes, and did not intend to create a "national police force" beyond the areas traditionally within the constitutional limitations on federal power. S.Rep. 1189, *supra*, p. 2. Congress recognized, however, that racketeering was a product of organized crime, and that the interstate nature of most racketeering activities called for federal enforcement. There is no suggestion in Congress' consideration of the 1934-1937 anti-crime legislation that the "Racketeering Bill" pertains to banking activities. The reason for this is obvious. The bill was aimed solely at racketeering in interstate commerce, and nothing more. If Congress had wished to protect banks from racketeers, it could have done so in the Bank Robbery Act (48 Stat. 783, 50 Stat. 749, 18 U.S.C. §2113).

There is no indication in the legislative history of the Copeland Act, or in the amendatory language of the Hobbs Act, that Congress intended a broad application of the statute beyond those acts it defined as "racketeering" directly affecting interstate commerce. There was no necessity for any such sweeping coverage to prevent the evil the legislation sought to reach, as in *Perez v. United States*, 402 U.S. 146 (1971) (loansharking); *Everard's Breweries v. Day*, 265 U.S. 545 (1924), (intoxicating liquors); *United States v. Darby*, 312 U.S. 100 (1941) discussing *Thornton v. United States*, 271 U.S. 414 (1926), (diseased cattle); and *Scarborough v. United States*, ____ U.S. ____, 97 S.Ct. 1963 (1977), (firearms).

Congress aimed the anti-racketeering legislation at a class of activity (racketeering) which it found to affect interstate commerce, and thus within federal legislative control. *United States v. Green*, 350 U.S. 415 (1956).

Only by limiting the application of the Hobbs Act to the class of activity intended by Congress, when that activity constitutes even a *de minimus* burden on commerce, can this Court preserve the constitutional principle that primary police power rests in the states.

CONCLUSION

The decision below reflects a sensitivity to the encroachment by judicial legislation into the settled police power of the states. The interpretation of the statute urged by the government could result in the isolated robbery or extortion of a corner liquor store becoming a federal offense. This was clearly not the intent of Congress. The decision below should be affirmed.

Respectfully submitted,

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